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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1979

No. **79-289**

PRUNEYARD SHOPPING CENTER and FRED SAHADI,  
*Appellants,*

v.

MICHAEL ROBINS, ET AL., *Appellees.*

On Appeal From the Supreme Court  
of the State of California

**JURISDICTIONAL STATEMENT**

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MICHAEL ROBINS, ET AL., *Appellees.*

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On Appeal From the Supreme Court  
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**JURISDICTIONAL STATEMENT**

The PruneYard Shopping Center ("Center") and its owner, Fred Sahadi, appeal from the judgment of the Supreme Court of the State of California which was filed on March 30, 1979, and became final on May 23, 1979, holding that the California Constitution gives appellees the right to solicit signatures on petitions within the Center.

**OPINIONS BELOW**

The Findings of Fact, Conclusions of Law, and Judgment of the Superior Court (Appendix A), and

the opinion of the District Court of Appeal (Appendix B), are not reported.

The opinion of the Supreme Court of the State of California (Appendix C) is reported at 23 Cal. 3d 899, 153 Cal. Rptr. 836, 592 P.2d 323 (1979).

### JURISDICTION

The decision of the Supreme Court of the State of California was filed on March 30, 1979. On May 23, 1979, a timely petition for rehearing was denied and the judgment became final (Appendix D). Appellants filed a notice of appeal to this Court in the Supreme Court of the State of California on May 30, 1979 (Appendix E).

This appeal is being docketed in this Court within 90 days from the denial of rehearing below. The jurisdiction of this Court to review the case on appeal is conferred by 28 U.S.C. § 1257(2) (appeal lies when a state "statute" is upheld over a claim that it is repugnant to the federal Constitution). A state constitutional provision is a state "statute" for purposes of this Court's appellate jurisdiction under that section. *Torcaso v. Watkins*, 367 U.S. 488 (1961); *Adamson v. California*, 332 U.S. 46, 48 n.2 (1947); *Railway Express Co. v. Virginia*, 282 U.S. 440 (1931). If the Court should conclude that this case is not within its appellate jurisdiction, appellants request that this jurisdictional statement be treated as a petition for a writ of certiorari pursuant to 28 U.S.C. § 2103. Jurisdiction would then lie under 28 U.S.C. § 1257(3).

### FEDERAL AND STATE CONSTITUTIONAL PROVISIONS

#### First Amendment, United States Constitution:

Congress shall make no law . . . abridging the freedom of speech. . . .

#### Fifth Amendment, United States Constitution:

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

#### Fourteenth Amendment, Section 1, United States Constitution:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

#### Article I, Section 2, California Constitution:

Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

#### Article I, Section 3, California Constitution:

[P]eople have the right to . . . petition government for redress of grievances.

### QUESTIONS PRESENTED

1. Whether the owner of a private shopping center which has not been dedicated to public use and which is not the functional equivalent of a municipality has a property right under the Fifth and Fourteenth Amendments to prohibit non-business-related petitioning on the premises of the center when the persons who wish to engage in such petitioning have other adequate and effective channels of communication in the area.

2. Whether the owner of a private shopping center which has not been dedicated to public use and which is not the functional equivalent of a municipality has a free speech right under the First and Fourteenth Amendments to prohibit non-business-related petitioning on the premises of the center, when the persons who

wish to engage in such petitioning have other adequate and effective channels of communication in the area.

#### STATEMENT OF CASE

Appellant PruneYard Shopping Center ("Center") is a privately owned shopping center located in Santa Clara County, California, occupying approximately 21 acres and containing 65 shops, 10 restaurants and a cinema. Public sidewalks and streets border the Center on two sides. The Center has a policy prohibiting all handbilling and circulation of petitions.

On November 17, 1975, appellees set up a table in the central courtyard of the Center and solicited signatures in support of petitions condemning Syria for refusing to allow Jews to leave the country and condemning a United Nations resolution on Zionism. Security guards employed by the Center, after informing appellees that their conduct violated the Center's policy, requested them to leave and pointed out that they could resume their efforts on the public sidewalks adjoining the Center. Appellees left the Center, but did not attempt to solicit signatures in any public places.

Appellees brought this action seeking an injunction against enforcement of the Center's policy. After a full evidentiary hearing, the Superior Court concluded that "[t]here has been no dedication of [the Center's] property to public use"; that the Center "is not the functional equivalent of a municipality"; that the appellees' petitions are "unrelated to the activities" of the Center; and that there are "adequate, effective channels of communication for [appellees] other than soliciting on the private property" of the Center. P. A-2, *infra*. The Superior Court accordingly denied an injunction, and the District Court of Appeal affirmed.

On appeal in the Supreme Court of the State of California, the Center owner urged affirmance on the grounds, *inter alia*, that his "property rights are protected by the federal Constitution"<sup>1</sup> and that his "free speech rights under both the federal and state constitutions would be infringed if [he] were required to utilize his private property in support of plaintiffs' expressive activity."<sup>2</sup> In a closely divided decision, that court reversed, holding that "sections 2 and 3 of article I of the California Constitution protect speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned." P. C-12, *infra*; 23 Cal. 3d at 910.<sup>3</sup>

#### THE QUESTIONS ARE SUBSTANTIAL

In reliance upon the decisions of this Court, appellants and other shopping center owners have established policies against non-business-related expression on the premises of their shopping centers. The decision below strips the owners of the right to establish such policies by denying the constitutional stature of their property rights. Moreover, the decision forces the shopping center owners to use their private property in support of the ideas of others, in violation of the owners' First and Fourteenth Amendment right to refrain

<sup>1</sup> Brief in Response to Amicus Curiae Briefs at 27 (emphasis deleted). This was appellants' principal brief in the California Supreme Court.

<sup>2</sup> Brief in Response to Amicus Curiae Briefs at 35 (emphasis deleted).

<sup>3</sup> On June 12, 1979, Mr. Justice Rehnquist denied appellants' application for a stay with the notation "Denied. No irreparable injury." The Superior Court entered an injunction on June 21, 1979.



from speaking. Because of its constitutional significance and its widespread impact on shopping centers, this appeal, which falls within the Court's mandatory jurisdiction, warrants plenary review.

**1. The Decision Below Denying Appellants' Fifth and Fourteenth Amendment Property Rights Is in Conflict With the Controlling Decisions of This Court.**

This Court has repeatedly explored in the context of shopping centers the reach of the holding in *Marsh v. Alabama*, 326 U.S. 501 (1946), that a "company town" is "the functional equivalent of a municipality" and is therefore required by the First and Fourteenth Amendments to allow expression as if it were a municipality. See *Food Employees v. Logan Plaza*, 391 U.S. 308 (1968); *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972); *Hudgens v. NLRB*, 424 U.S. 507 (1976) (overruling *Food Employees v. Logan Plaza*). The controlling decisions establish that a shopping center owner has a right under the Fifth and Fourteenth Amendments to bar those who would conduct speech activities over his objection.

*Lloyd Corp.* involved a group which sought access to a large shopping center known as Lloyd Center to distribute handbills opposing American military involvement in the Vietnam War. Finding that there were adequate alternative places on adjoining public property for distributing handbills, 407 U.S. at 567, and that the message of the handbills "had no relation to any purpose for which the center was built and being used," 407 U.S. at 564, the Court held that the owner of the center could not be forced to allow the handbilling. 407 U.S. at 570. The decision in *Hudgens* went further, making clear that would-be speakers have no con-

stitutional right to demand that a shopping center provide a forum for expression, even when that expression is related to the purposes of the center. *Lloyd Corp.* and *Hudgens* recognized a sharp distinction for constitutional purposes between public property and private property, holding that even a large self-contained shopping center is private property and is not the functional equivalent of a municipality. *Lloyd Corp. v. Tanner*, 407 U.S. at 569; *Hudgens v. NLRB*, 424 U.S. at 518-20.

In rejecting a First Amendment right of access to shopping centers, this Court has grounded the competing rights of shopping center owners squarely on the takings clause of the Fifth Amendment and the due process clauses of the Fifth and Fourteenth Amendments. In *Lloyd Corp.*, the Court "granted certiorari to consider [the shopping center owner's] contention that the decision below violates rights of private property protected by the Fifth and Fourteenth Amendments." 407 U.S. at 552-53. Quoting the relevant sections of the Fifth and Fourteenth amendments, 407 U.S. at 567, the Court instructed that "[t]he Fifth and Fourteenth Amendment rights of private property owners . . . must be respected and protected." 407 U.S. at 570. See also *Hudgens v. NLRB*, 424 U.S. at 516-17 (quoting Mr. Justice Black's dissent in *Food Employees v. Logan Plaza*, 391 U.S. at 332-33).

Related cases involving the clash between property rights and rights of expression have confirmed that the property owner's rights are premised on the federal constitution. In *Marsh v. Alabama*, for example, the Court stated that its function was to "balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion. . . ." 326 U.S. at 509. And in *Central Hardware Co. v.*

*NLRB*, 407 U.S. 539 (1972), the Court held that the mere opening of parking lots to the public does not make the parking lots the equivalent of a public municipal facility because such a ruling would "constitute an unwarranted infringement of long-settled rights of private property protected by the Fifth and Fourteenth Amendments." 407 U.S. at 547.

While a state court is ordinarily free to interpret the provisions of a state constitution to create rights beyond those afforded by the United States Constitution, it may not in so doing infringe upon the federal constitutional rights of others. In an earlier decision, the California Supreme Court recognized this fundamental principle:

Under the holding of the *Lloyd* case, the due process clause of the United States Constitution protects the property interests of the shopping center owner from infringement. . . . Even were we to hold that the state Constitution in some manner affords broader protection than the First Amendment of the United States Constitution . . . nevertheless supremacy principles would prevent us from employing state constitutional provisions to defeat defendant's federal constitutional rights. *Diamond v. Bland*, 11 Cal. 3d 331, 335 n.4, 113 Cal. Rptr. 468, 471 n.4, 521 P. 2d 460, 463 n.4, cert. den. 419 U.S. 885 (1974).

In the present case, the court below overruled *Diamond v. Bland* and held that the California Constitution can, and does, require shopping center owners to allow unrelated speech and petitioning. Its new-found analysis concludes with a suggestion that *Lloyd Center* was somehow a special case:

The court in *Lloyd* examined the functions performed by *Lloyd's* center but did not purport to define the nature or scope of Fifth and Fourteenth

Amendment rights of shopping center owners generally. P. C-4, *infra*; 23 Cal. 3d at 904.

Nothing in the *Lloyd Corp.* opinion or in subsequent decisions supports the notion that this Court intended *Lloyd Corp.* to be limited to its facts, nor does the opinion below identify any salient differences between *Lloyd Center* and *PruneYard*. In fact, both are large centers located on private property; in both cases the speech activity was unrelated to the business of the center; and in both cases there were adequate alternative sites available to solicit signatures on petitions or to distribute handbills.

The California Supreme Court also asserted that this Court's "conclusion [in *Hudgens v. NLRB*] that the National Labor Relations Act controlled the issues there presented indicates that *Lloyd* by no means created any property right immune from regulation." P. C-5; *infra*; 23 Cal. 3d at 905. The court's reliance on *Hudgens* is misplaced. The decision in that case did indeed recognize that § 7 of the National Labor Relations Act, 29 U.S.C. § 157, may entitle employees engaged in a lawful economic strike to picket at the entrances to a store operated by their employer and located in a shopping center. But this Court did not in *Hudgens* and has not in other cases lightly dismissed the employer's property rights. As explained in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956):

Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with maintenance of the other. 351 U.S. at 112.



A series of landmark decisions has fleshed out accommodations under varying circumstances between the right of the employer to determine how his property shall be used and the rights of employees to organize and to bargain collectively.<sup>4</sup> For example, decisions of this Court allow employers to bar nonemployee organizers except when the organizer can demonstrate that "the inaccessibility of employees makes ineffective the reasonable attempts by non-employees to communicate with them through the usual channels." *NLRB v. Babcock & Wilcox Co.*, 351 U.S. at 112. And such organizational picketing can be conducted over the employer's objection only during an organizational campaign. *Central Hardware Co. v. NLRB*, 407 U.S. at 545-46. Thus, even in the interpretation of the National Labor Relations Act, which expresses the strong national policy of "promot[ing] the peaceful settlement of industrial disputes", *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 211 (1964), property rights have been forced to yield only under carefully limited circumstances and then only temporarily.

The opinion of the court below recites a number of other permissible types of property regulation, such as zoning and environmental restrictions, to support its apparent view that property rights must yield to any conceivable state interest. P. C-6, *infra*; 23 Cal. 3d at 906. This sketchy analysis is entirely unpersuasive. State regulation of property to promote orderly development, to ensure safety, or to protect public health or the environment is premised on the police power and involves interest far different from those involved

<sup>4</sup> See, e.g., *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956); *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972); *Hudgens v. NLRB*, 424 U.S. 507 (1976).

in the present case. This is a case involving, on the one hand, the interest of appellees in utilizing the property of the shopping center owner to solicit signatures on petitions, and, on the other hand, the interest of the shopping center's owner in controlling the use of his property. These are precisely the conflicting interests which were before this Court in *Lloyd Corp.* and were resolved in favor of the shopping center owner.<sup>5</sup>

In the present case, the California Supreme Court exceeded its authority when it substituted its own resolution of these competing rights and interests. As Justice Richardson for the dissenters emphasized, the decision below cannot be squared with *Lloyd Corp.*:

The *Lloyd* rationale is applicable and unanswerable. The majority may not evade it by resort, in this instance, to the California Constitution, which must yield to a paramount federal constitutional imperative. P. C-20, *infra*; 23 Cal. 3d at 916.

**2. The Decision Below Conflicts With a Decision of Another State Supreme Court as to Whether a State Constitutional Provision May Supersede a Shopping Center Owner's Property Rights Under the Fifth and Fourteenth Amendments.**

The decision below is in conflict with that of the Oregon Supreme Court in *Lenrich Associates v. Heyda*, 264 Or. 122, 504 P.2d 112 (Ore. 1972). Members of a religious group who wished to conduct speech activities in a shopping mall contended in that case that the provisions of the Oregon constitution "give the individual

<sup>5</sup> Although the California Supreme Court in the present case refers to provisions of the California Constitution guaranteeing the rights to petition and initiate change, pp. C-8, C-9, *infra*; 23 Cal.3d at 907-08, in fact this case involves neither a petition to the government of the State of California nor direct citizen action in the form of initiative, referendum or recall.

rights of expression and religious freedom greater protection than that provided under *Tanner*". 264 Or. at 126, 504 P.2d at 114.

After close examination of Mr. Justice Powell's opinion for the Court in *Lloyd Corp.*, the Oregon court found it "clear" that this Court was there "engaged in weighing the First Amendment rights of the respondents against the Fifth and Fourteenth Amendment rights of private property owners." 264 Or. at 128, 504 P.2d at 115. The court held that *Lloyd Corp.* was controlling and that the shopping mall owner's Fifth and Fourteenth Amendment property rights cannot be overcome by a state constitutional provision. One member of the Oregon court, concurring, found *Lloyd Corp.* ambiguous as to whether the property rights of the shopping center owners have a constitutional basis in the absence of clarification by this Court: "[N]o one can be certain of the intention of the Supreme Court of the United States until the opinion is clarified." 264 Or. at 135, 504 P.2d at 118-19.

This Court should resolve the conflict between *Lenrich* and the decision below by providing guidance as to the source and scope of the property rights of shopping center owners.

**3. The Decision Below Denying the Shopping Center Owner's First and Fourteenth Amendment Right to Control the Use of His Property for Expressive Purposes Is in Conflict With the Governing Decisions of This Court.**

Although the California Supreme Court opinion discusses at length the free speech rights of appellees, it fails to recognize the First and Fourteenth Amendment free speech rights of appellants. In common with owners of other private property, the shopping center

owner is constitutionally entitled to muster his property in support of ideas he espouses, to lend his property on a neutral basis to all who would use it, or to determine, as has the PruneYard's owner, that the center will not be made available for non-business-related speech. These rights flow from the fundamental distinction between public and private property, delineated for shopping centers in the line of cases culminating in *Hudgens v. NLRB*, *supra*. Under those standards, the PruneYard is without question private property: the trial court specifically found that the Center is "not the functional equivalent of a municipality" and that "[t]here has been no dedication of [the Center's] property to public use." P. A-2, *infra*.

The owner of the PruneYard has chosen to withhold the use of his property from all non-business-related speech, a decision which is protected by the First Amendment.\* This Court enunciated the fundamental "proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). The right to refrain from speaking has led the Court to strike down state laws requiring public school students to salute and pledge allegiance to the flag, *Board of Education v. Barnette*, 319 U.S. 624 (1943); requiring newspapers to publish replies of political candidates whom they criticize, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); and forbidding automobile drivers to obscure a license

\* See F. Schauer, *Hudgens v. NLRB and the Problem of State Action in First Amendment Adjudication*, 61 Minn. L. Rev. 433, 448-51 (1977).



plate motto which they find offensive. *Wooley v. Maynard*, *supra*.

As these cases make clear, the First Amendment right to refrain from speaking includes the right to decline to use one's property for speech purposes. The constitutional vice of the New Hampshire statute struck down in *Wooley* was that it

"in effect require[d] that appellees use their private property as a 'mobile billboard' for the State's ideological message. . . ."

430 U.S. at 715. Moreover, a state mandate to provide a forum for the speech of others equally offends the First Amendment as does a requirement to speak or display a state-mandated message. *Miami Herald Publishing Co. v. Tornillo*, *supra*.

The decision of the court below, compelling the Center's owner, Fred Sahadi, to make his private property available to appellees as a forum for expressing their views, violates his right to determine which ideas, if any, his property will be used to promote. But what the court below has done in this case abridges the rights not just of one shopping center owner but of thousands of shopping center owners in California, whose rights according to the California Supreme Court now have no basis in the U.S. Constitution. Such a departure from the settled principles of the First and Fourteenth Amendments merits full review by this Court.

# CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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Dated: August, 1979

## **Appendices**

A-1

**APPENDIX A**

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SANTA CLARA

No. 349363

MICHAEL ROBINS, a minor, by his guardian ad litem, DAVID ROBINS, IRA DAVID MARCUS, a minor, by his guardian ad litem, FRED WERNER MARCUS, and ROBERTA BELL-KLIGLER,  
*Plaintiffs,*

vs.

PRUNEYARD SHOPPING CENTER, and FRED SAHADI, individually and doing business as THE TOWERS VENTURE, and DOES I through V, inclusive, *Defendants.*

**Findings of Fact and Conclusions of Law**

The above-entitled cause came on regularly for trial on June 15, 1976, in Courtroom 13 of the above-entitled Court, the Honorable Homer B. Thompson, Judge, presiding, without a jury. Plaintiffs appearing by Attorneys Ann Miller Ravel and Philip L. Hammer of Morgan, Beuzay, Hammer, Ezgar, Bledsoe & Rucka, and defendants appearing by Attorney Thomas P. O'Donnell of Ruffo, Ferrari & McNeil.

Said cause having been heard, evidence both oral and documentary having been introduced, and said cause having been argued and briefed and submitted for decision, the court having rendered its decision in favor of defendants and against plaintiffs now makes the following Findings of Fact and Conclusions of Law:

**FINDINGS OF FACT**

The court finds that:

1. THE PRUNEYARD SHOPPING CENTER ("the CENTER") is located in Campbell, California, entirely on private property and is owned by defendant FRED SAHADI.

2. The CENTER has a number of commercial enterprises, such as specialty shops, restaurants, banks and a market.

3. The policy of the CENTER prohibits all handbilling and circulation of petitions.

4. Plaintiffs, while on the private property of the CENTER, sought to obtain signatures to petitions unrelated to the activities of the CENTER.

5. Plaintiffs' petitions were not in the nature of initiative petitions.

6. The county in which the CENTER is located has many shopping centers, public shopping and business areas, public buildings, parks, stadia, universities, colleges, schools, post offices and similar public areas where large numbers of people congregate and where people can freely exercise First Amendment rights, including, without limitation, distribution of handbills and seeking signatures on petitions.

7. Plaintiffs only attempted to obtain signatures to their petition on private property, rather than in public areas whether nearby or otherwise.

#### CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the court makes the following Conclusions of Law:

1. There has been no dedication of the CENTER's property to public use, such as to entitle plaintiffs to exercise the asserted First Amendment rights.

2. There has been no dedication of the CENTER's property to public use, such as to entitle plaintiffs to exercise the asserted rights under the Constitution of the State of California.

3. The CENTER is not the functional equivalent of a municipality.

4. There are adequate, effective channels of communication for plaintiffs other than soliciting on the private property of the CENTER.

Let judgment be entered accordingly.

Dated: September 14, 1976

/s/ HOMER B. THOMPSON  
Homer B. Thompson  
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA

No. 349363

MICHAEL ROBINS, a minor, by his guardian ad litem, DAVID ROBINS, IRA DAVID MARCUS, a minor, by his guardian ad litem, FRED WERNER MARCUS, and ROBERTA BELL-KLIGLER,  
*Plaintiffs,*

vs.

PRUNEYARD SHOPPING CENTER, and FRED SAHADI, individually and doing business as THE TOWERS VENTURE, and DOES I through V, inclusive, *Defendants.*

**Judgment**

This cause came on regularly for trial in June 15, 1976, in Courtroom 13 of the above-entitled court, the Honorable Homer B. Thompson, Judge, presiding, sitting without a jury. Plaintiff appearing by Attorney Philip L. Hammer of Morgan, Beauzay, Hammer, Ezgar, Bledsoe & Rucka, and defendants appearing by Attorney Thomas P. O'Donnell of Ruffo, Ferrari & McNeil, and evidence both oral and documentary having been presented by both parties and cause having been argued and briefed and submitted for decision,

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiffs MICHAEL ROBINS, a minor, by his guardian ad litem, DAVID ROBINS, IRA DAVID MARCUS, a minor, by his guardian ad litem, FRED WERNER MARCUS, and ROBERTA BELL-KLIGLER, take nothing by their complaint from defendants and that defendants PRUNEYARD SHOPPING CENTER and FRED SAHADI, individually and doing business as THE TOWERS VENTURE, have judgment against Plaintiffs and recover from Plaintiffs their costs of suit herein.

Dated this 14th day of September, 1976.

/s/ HOMER B. THOMPSON  
 Homer B. Thompson  
 Judge of the Superior Court

**APPENDIX B**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
 FIRST APPELLATE DISTRICT, DIVISION FOUR

1 Civil 40776

(Sup. Ct. No. 349363)

MICHAEL ROBINS, a minor, by his guardian ad litem, DAVID ROBINS, IRA DAVID MARCUS, a minor, by his guardian ad litem, FRED WERNER MARCUS AND ROBERTA BELL-KLIGLER,  
*Plaintiffs and Appellants,*

vs.

PRUNEYARD SHOPPING CENTER, et al.,  
*Defendants and Respondents.*

On April 7, 1976, plaintiffs and appellants filed suit for preliminary and permanent injunction in the Santa Clara County Superior Court. Appellants sought to enjoin defendants and respondents Pruneyard Shopping Center and its owner, from denying them access to respondents' privately owned shopping center for the purpose of circulating petitions on social and political matters. Following judgment for respondents, this appeal was filed.

Respondent Pruneyard is a privately owned shopping center located in the City of Campbell. It consists of approximately 21 acres, five of which are devoted to parking, and 16 of which are occupied by covered walkways, plazas, sidewalks and buildings containing more than 65 specialty shops, 10 restaurants and a cinema. Members of the public are invited to visit the Pruneyard for the purpose of patronizing the commercial establishments located therein. It is the policy of the Pruneyard not to permit any visitor or tenant to engage in any expressive activity, including the circulation of petitions, which is not directly related



to the commercial purposes of the Pruneyard. This policy has been strictly enforced on a non-discriminatory basis.

Appellants went to the Pruneyard<sup>1</sup> and set up a card table in one corner of the center's "Grand Plaza," a central courtyard. No sign was placed on the table. Appellants then proceeded to ask passersby to sign the petitions. Their activity was peaceful and orderly, and was well received by the center's patrons.

Within five to ten minutes after appellants began soliciting signatures on the Pruneyard premises, appellants were approached by a uniformed security officer, who informed them that such conduct was against the regulations of the center. Appellants spoke to the guard's superior who informed them that they would have to leave since they did not have permission to be there. The officers suggested that the appellants continue soliciting signatures on the public sidewalks on the center's perimeter.<sup>2</sup> Appellants ceased their activity and immediately left the premises.

After leaving the Pruneyard, appellants proceeded to another privately owned shopping center, the Westgate in San Jose. There they were again denied access for the purpose of circulating their petitions. Appellants made no further efforts to gather signatures on their petitions at any location.<sup>3</sup> Based on this record the trial court found that appellants "only attempted to obtain signatures to their petition on private property, rather than in public areas whether nearby or otherwise."

<sup>1</sup> Other groups went to the San Jose Airport and to other local shopping centers.

<sup>2</sup> The Pruneyard is bordered on two sides by private property, and on the other two sides by public streets and sidewalks.

<sup>3</sup> Appellants made no attempt to collect signatures in downtown San Jose, Willow Glen, Campbell, Los Gatos or Saratoga; nor did they attempt to solicit signatures at the main post office in San Jose or at any public athletic event.

Evidence submitted by appellants establishes the following:

(1) As of 1970, 92.2 percent of the county's population lived outside of the central San Jose planning area in suburban or rural communities.

(2) During the period between 1960 and 1970, central San Jose experienced a 4.7 percent decrease in population as compared to an overall 67 percent increase for the 19 north county planning areas.

(3) Retail sales in the central business district have declined to such an extent that statistics thereon have not been kept since 1973. In 1972, the central business district accounted for only 4.67 percent of the county's total retail sales.

(4) In a given 30-day period between October 1974 and July 1975, adults making one or more shopping trips to the 15 largest shopping centers in the metropolitan San Jose standard metropolitan statistical area totaled 685,000 out of 788,000 adults living within that area.

(5) During that 1974-1975 season, monthly attendance at each of the county's 18 parks averaged only three percent of the total population. Combined monthly attendance at all of Santa Clara County's 18 parks averaged 54 percent of the county's total population while total park attendance for that year was 7,712,432.

(6) The largest share of the county's population is likely to spend the most significant amount of its time in the suburban areas where its wants and needs are satisfied, and shopping centers provide the location, goods and services to satisfy those wants and needs.

Appellants recognize the existence of a conflict between their First Amendment rights and respondents' constitutional right to the free use and enjoyment of their private property under the Fifth and Fourteenth Amendments.

Relying upon *Lloyd Corp. v. Tanner* (1972) 407 U.S. 551, and *Diamond v. Bland* (1974) 11 Cal.3d 331, appellants contend that these competing constitutional and property rights must be balanced, with the decisive factor being the availability of other public forums. On the other hand, respondents contend that a constitutional right to engage in First Amendment activities in privately owned shopping centers exists only if the shopping center is the functional equivalent of a municipal business district. Absent a finding of functional equivalence, respondents maintain, individuals seeking to engage in expressive activity on private property have failed to establish the element of state action necessary to activate the constitutional protections of the First Amendment.

The First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on state action, not on action by the owner of private property used nondiscriminatorily for private purposes only. (*Lloyd Corp. v. Tanner*, *supra*, 407 U.S. at p. 567; see *Hudgens v. NLRB* (1976) 424 U.S. 507, 513.) In *Marsh v. Alabama* (1946) 326 U.S. 501, the United States Supreme Court recognized that, under some circumstances, property that is privately owned may for First Amendment purposes be treated as though it were publicly held. The court therein concluded that a member of a religious organization was constitutionally entitled to distribute religious literature on the streets of the company-owned town of Chickasaw, Alabama. In *Food Employees Union v. Logan Plaza* (1968) 391 U.S. 308, the court held that the shopping center there involved was the "functional equivalent" of the business district of Chickasaw (391 U.S. at p. 318), and that the center therefore could not prohibit the exercise of "... First Amendment rights [by the labor union] on the premises in a manner and for a purpose generally consonant with

the use to which the property was actually put." (Id., at pp. 319-320.)

In *Lloyd Corp. v. Tanner*, *supra*, 407 U.S. 551, however, the court declined to extend the rationale of *Marsh* and *Logan Plaza* to require the owner of a shopping center to permit the respondents to distribute, on the premises of the shopping center, handbills regarding the draft and the Vietnam war. In so holding, the court rejected respondents' contention that the property of a large shopping center serves the same purposes as a business district of a municipality, and therefore has been dedicated to certain types of public use.<sup>5</sup> *Lloyd* distinguished *Logan Plaza* on the

<sup>4</sup> The court specifically stated it was not passing upon the question of "... picketing which was not thus directly related in its purpose to the use to which the shopping center property was being put." (391 U.S. at p. 320, fn. 9.)

<sup>5</sup> "The argument reaches too far. The Constitution by no means requires such an attenuated doctrine of dedication of private property to public use. The closest decision in theory, *Marsh v. Alabama*, *supra*, involved the assumption by a private enterprise of all of the attributes of a state-created municipality and the exercise by that enterprise of semi-official municipal functions as a delegate of the State. In effect, the owner of the company town was performing the full spectrum of municipal powers and stood in the shoes of the State. In the instant case there is no comparable assumption or exercise of municipal functions or power.

"Nor does property lose its private character merely because the public is generally invited to use it for designated purposes. Few would argue that a free-standing store, with abutting parking space for customers, assumes significant public attributes merely because the public is invited to shop there. Nor is size alone the controlling factor. The essentially private character of a store and its privately owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center. . . .

"We hold that there has been no such dedication of *Lloyd's* privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amend-



basis that, unlike the situation in *Logan Plaza*, the hand-billing had no relation to any purpose for which the shopping center was being used, and that respondents had adequate alternative avenues to disseminate their views by distributing the material on the public streets and sidewalks, including those surrounding the shopping center. The court dismissed as dicta the holding in the *Logan Plaza* opinion that a shopping center is the functional equivalent of a public business district. (407 U.S. 562-563.)<sup>6</sup> On the basis of this language the *Lloyd* opinion was interpreted as establishing alternative grounds for holding that the owner of private property may not prohibit First Amendment activities on his premises: (1) the property has been so dedicated to the public use that it is the functional equivalent of a municipality or, (2) the expressive activity is related to the business purpose of the shopping center and no adequate alternative avenues of communication exist. (See e.g., *Diamond v. Bland*, *supra*, 11 Cal.3d at pp. 334-335.)

In *Hudgens v. NLRB*, *supra*, 424 U.S. 507, however, the Supreme Court held that the owner of a private shopping center which has not been dedicated to public use, may prohibit the exercise of First Amendment rights therein regardless of whether there exist adequate alternative channels of communication for such activities. In *Hudgens*, a group of labor union members who engaged in peaceful primary picketing within the confines of a privately owned shopping center were threatened by an agent of the owner

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ment rights. Accordingly, we reverse the judgment and remand the case to the Court of Appeals with directions to vacate the injunction." (407 U.S. at pp. 569-570.)

<sup>6</sup> "*Marsh* was distinguished on the basis that there the owner of the company town was substituting for and performing the customary functions of government; moreover, there existed no public streets on which First Amendment activities could be carried out." (*Diamond v. Bland*, *supra*, 11 Cal.3d at p. 334.)

with arrest for criminal trespass if they did not depart. The Court of Appeals for the Fifth Circuit held that the picketing was related to the use to which the property was put (501 F.2d 161, 168), and that alternative means of communication to reach the intended audience "were either unavailable or inadequate." (501 F.2d at p. 169.) Relying upon *Lloyd*, the Court of Appeal therefore upheld the NLRB's cease-and-desist order.

The Supreme Court reversed the Fifth Circuit's decision and concluded that "under the present state of the law the constitutional guarantee of free expression has no part to play in a case such as this." (*Hudgens v. NLRB*, *supra*, 424 U.S., at p. 521.) In so holding, the court recognized that the holdings of *Lloyd* and *Logan Plaza* could not be reconciled, and that the ultimate holding in *Lloyd* amounted to a total rejection of the holding of *Logan Plaza*. (424 U.S., at p. 518.)

"If a large self-contained shopping center is the functional equivalent of a municipality, as *Logan Valley* held, then the First and Fourteenth Amendments would not permit control of speech within such a center to depend upon the speech's content. . . . It conversely follows, therefore, that if the respondents in the *Lloyd* case did not have a First Amendment right to enter that shopping center to distribute handbills concerning Vietnam, then the pickets in the present case did not have a First Amendment right to enter this shopping center for the purpose of advertising their strike against the Butler Shoe Co.

"We conclude, in short, that under the present state of the law the constitutional guarantee of free expression has no part to play in a case such as this." (424 U.S., at pp. 520-521; fns. omitted.)

In the present case the trial court conclusively determined that respondents' shopping center has not been so dedicated to public use as to have become the functional

equivalent of a municipal business district. Appellants do not allege error as to these conclusions, nor do they attack the sufficiency of the evidence in support thereof. Under these circumstances, the First Amendment free speech guarantee is inapplicable, regardless of whether or not adequate alternative channels of communication were available to appellants.

## II

The trial court found that: "The county in which the center is located has many shopping centers, public shopping and business areas, public buildings, parks, stadia, universities, colleges, schools, post offices and similar public areas where large numbers of people congregate and where people can freely exercise First Amendment rights, including, without limitation, distribution of handbills and seeking signatures on petitions." On the basis of this finding, the court concluded that "There are adequate, effective channels of communication for plaintiffs other than soliciting on the private property of the CENTER."

Appellants contend that the trial court improperly considered private forums in determining whether there were alternative forums available to appellants in which they might effectively exercise their First Amendment rights. They argue that the court may look only to public forums that are traditionally open to speech activities in making such a determination. Appellants further assign error to the trial court's failure to make an independent finding as to the availability of publicly owned forums.

In view of the trial court's conclusion that respondents' shopping center has not been dedicated to public use, appellants cannot prevail regardless of whether or not adequate and effective alternative channels of communication are available to them. Under these circumstances, any error by the trial court in determining the availability of other forums is harmless. (*D'Amico v. Board of Medical*

*Examiners* (1974) 11 Cal. 3d 1, 18-19; *Davey v. Southern Pacific Co.* (1897) 116 Cal. 325, 329; *Chilton v. Contra Costa Community College Dist.* (1976) 55 Cal.App.3d 544, 548-549; see Cal. Const., art. VI, § 13; Code Civ. Proc., § 475.)

Moreover, the distinction urged by appellants between forums which are publicly held and those which are privately owned is both artificial and unnatural, and is unsupported by case law. Appellants rely upon the following language from *Diamond v. Bland*, *supra*, 11 Cal.3d at pp. 334-335: "The . . . [United States Supreme Court, in *Lloyd*] stated that, in view of the availability . . . of other *public forums* for the distribution and dissemination of their ideas, '[i]t would be an unwarranted infringement of property rights to require them to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist.' (407 U.S. at p. 567 . . .) . . . In this case, as in *Lloyd*, plaintiffs have alternative, effective channels of communication, for the customers and employees of the center may be solicited on any public sidewalks, parks and streets adjacent to the Center and in the communities in which such persons reside." (Emphasis added.)

The test set forth in *Lloyd* and *Diamond* is whether "adequate alternative avenues of communication exist." Although both *Lloyd* and *Diamond* give as examples of such alternatives certain forums located on publicly owned property, there is no indication in either case that such examples were intended to be either exclusive or exhaustive. Nor is there any indication that the reference to "public forums" is limited to property owned by the government. Rather, the context in which the term "public forum" is used, coupled with the test of the availability of "adequate alternative avenues of communication," indicates that a court may properly consider any forum that is available for the free exercise of expressive activity regardless of

whether that forum is located on property owned by the government or by a private person. The only relevant consideration is whether such forum is in fact open and available for the free exercise of expressive activity.

As the trial court may consider privately owned, as well as publicly held property, in determining whether adequate alternative avenues of communication exist, the trial court did not err in failing to make an independent finding as to the existence of publicly held forums.<sup>7</sup>

### III

Appellants contend that the guarantees of freedom of speech and petition found in sections 9 and 10 respectively of the California Constitution, provide adequate and independent state grounds for enjoining respondents from prohibiting appellants' expressive activities on the premises of the Pruneyard.

This contention was summarily rejected by the California Supreme Court in *Diamond v. Bland*, *supra*, 11 Cal.3d 331. The court declared at page 335, footnote 4: "Under the holding of the *Lloyd* case, the due process clause of the United States Constitution protects the property interests of the shopping center owner from infringement (407 U.S. at pp. 552-553, 567, 570 . . . .) That being so, we must reject plaintiffs' proposal, echoed in the dissenting opinion herein, that we consider using the 'free speech' provisions of our state Constitution to reach a contrary result in this case. Even were we to hold that the state Constitution in

<sup>7</sup> Appellants urge that this court exercise its power pursuant to Code of Civil Procedure section 909 to make a finding as to the existence or nonexistence of adequate alternative forums, and take additional evidence for the purpose of making such finding. However, having concluded that the existence or nonexistence of alternative forums is immaterial, the exercise of our power pursuant to section 909 would be inappropriate in this case. (See *Tupman v. Haberkern* (1929) 208 Cal. 256, 269-270.)

some manner affords broader protection than the First Amendment to the United States Constitution (a question which we expressly leave open), nevertheless supremacy principles would prevent us from employing state constitutional provisions to defeat defendant's federal constitutional rights. (Accord: *Lenrich Associates v. Heyda* (Ore.) 504 P.2d 112, 115-116 [plurality opn.] .)

Appellants maintain that the language of the Fourteenth Amendment does not support the Supreme Court's conclusion that principles of supremacy preclude reliance upon the free speech provisions of the state Constitution. Whether or not the *Diamond* case was correctly decided, this court is bound by and must follow prior California Supreme Court decisions. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

The judgment is affirmed.

Caldecott, P. J.

We concur:

Rattigan, J.

Christian, J.



**APPENDIX C**

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

March 30, 1979

S.F. 23812

MICHAEL ROBINS, a Minor, etc., et al.,  
*Plaintiffs and Appellants,*

v.

PRUNEYARD SHOPPING CENTER et al.,  
*Defendants and Respondents.*

• • • • •

**Opinion**

NEWMAN, J.—In this appeal from a judgment denying an injunction we hold that the soliciting at a shopping center of signatures for a petition to the government is an activity protected by the California Constitution.

Pruneyard Shopping Center is a privately owned center that consists of approximately 21 acres—5 devoted to parking and 16 occupied by walkways, plazas, and buildings that contain 65 shops, 10 restaurants, and a cinema. The public is invited to visit for the purpose of patronizing the many businesses. Pruneyard's policy is not to permit any tenant or visitor to engage in publicly expressive activity, including the circulating of petitions, that is not directly related to the commercial purposes. The policy seems to have been strictly and disinterestedly enforced.

Appellants are high school students who attempted one Saturday afternoon to solicit support for their opposition to a United Nations resolution against "Zionism." They set up a cardtable in a corner of Pruneyard's central courtyard and sought to discuss their concerns with shoppers and to solicit signatures for a petition to be sent to

the White House in Washington. Their activity was peaceful and apparently well-received by Pruneyard patrons.

Soon after they had begun their soliciting they were approach by a security guard who informed them that their conduct violated Pruneyard regulations. They spoke to the guard's superior, who informed them they would have to leave because they did not have permission to solicit. The officers suggested that appellants continue their activities on the public sidewalk at the center's perimeter.<sup>1</sup>

Appellants immediately left the premises and later brought suit. The trial court rejected their request that Pruneyard be enjoined from denying them access.

Our main questions are: (1) Did *Lloyd Corp. v. Tanner* (1972) 407 U.S. 551 [33 L.Ed.2d 131, 92 S.Ct. 2219] recognize federally protected property rights of such a nature that we now are barred from ruling that the California Constitution creates broader speech rights as to private property than does the federal Constitution. (2) If not, does the California Constitution protect speech and petitioning at shopping centers?

This court last faced those issues in *Diamond v. Bland* (1974) 11 Cal.3d 331 [113 Cal.Rptr. 468, 521 P.2d 460] (*Diamond II*), wherein *Diamond v. Bland* (1970) 3 Cal.3d 653 [91 Cal.Rptr. 501, 477 P.2d 733] (*Diamond I*) was reversed because of *Lloyd Corp. v. Tanner, supra*, 407 U.S. 551. The *Diamond* cases involved facts much like those of the instant case. *Diamond II* stated: "*Lloyd's* rationale is controlling here. In this case, as in *Lloyd*, plaintiffs have alternative, effective channels of communication, for the customers and employees of the center may be solicited on any public sidewalks, parks and streets adjacent to the Center and in the communities in which such persons reside." (11 Cal.3d at p. 335.)

<sup>1</sup> Pruneyard is bordered on two sides by private property, on its other sides by public sidewalks and streets.

The opinion articulating that conclusion did not examine the liberty of speech clauses of the California Constitution. A footnote suggested that such an inquiry was barred by federal and state supremacy clauses<sup>2</sup> because "[u]nder the holding of the *Lloyd* case, the due process clause of the United States Constitution protects the property interests of the shopping center owner from infringement (407 U.S. at pp. 552-553, 567, 570 [33 L.Ed.2d at pp. 133-134, 141, 143])." (11 Cal.3d at p. 335, fn. 4.)

Respondents contend that *Diamond II* was correctly decided and controls this case. They argue that *Lloyd* did more than define parameters of First Amendment free speech, that it recognized identifiable property rights under the Fifth and Fourteenth Amendments. They acknowledge that states are free to establish greater rights under their constitutions than those guaranteed by the federal Constitution. They contend however that, since a ruling that petitioners' activity here was protected by the California Constitution would diminish respondents' property rights under *Lloyd*, we may not so rule.

Appellants argue that *Lloyd* merely defined federal speech rights and did not prescribe federal property rights. Even if it did prescribe such rights, appellants contend that, since states generally may regulate shopping centers for proper state purposes, California is free to impose public-interest restrictions on the centers in order to safe-

<sup>2</sup> Article VI, clause 2 of the United States Constitution provides: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

Article III, section 1 of the California Constitution provides: "The State of California is an inseparable part of the United States of America, and the United States Constitution is the supreme law of the land."

guard the right of petition. That right, they assert, surely reflects a public interest that equals in importance the interests that justify restrictions designed to ensure health and safety, a natural environment, aesthetics, property values, and other accepted goals. Such restrictions on property routinely are enacted or declared and enforced.

Appellants ask us to overrule *Diamond II* and to hold that the California Constitution does guarantee the right to seek signatures at shopping centers.

DOES *Lloyd* IDENTIFY SPECIAL PROPERTY RIGHTS  
PROTECTED BY THE FEDERAL CONSTITUTION?

*Lloyd* held that a shopping center owner could prohibit distribution of leaflets when they communicated no information relating to the center's business and when there was an adequate, alternate means of communication. The court stated, "We hold that there has been no such dedication of *Lloyd*'s privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights." (407 U.S. at p. 570 [33 L.Ed.2d at p. 143].)

Appellants correctly assert that *Lloyd* is primarily a First Amendment case. The references to Fifth and Fourteenth Amendment rights were made specifically in connection with the court's discussion of state action requirements. The court was focusing on *Marsh v. Alabama* (1946) 326 U.S. 501 [90 L.Ed. 265, 66 S.Ct. 276], which held that a property owner's actions in some circumstances are equivalent to state action because of public functions performed by the property. The court in *Lloyd* examined the functions performed by *Lloyd*'s center but did not purport to define the nature or scope of Fifth and Fourteenth Amendment rights of shopping center owners generally.

Subsequent decisions support that reading of *Lloyd*. In *Hudgens v. NLRB* (1976) 424 U.S. 507 [47 L.Ed.2d 196,

96 S.Ct. 1029] the court again considered First Amendment rights in relation to private property. Though it concluded that the First Amendment did not protect picketing in a shopping center, it acknowledged that "statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others . . . ." (*Id.*, p. 513 [47 L.Ed.2d p. 203].) The court's conclusion that the National Labor Relations Act controlled the issues there presented indicates that *Lloyd* by no means created any property right immune from regulation.

*Eastex, Inc. v. NLRB* (1978) 437 U.S. 556 [57 L.Ed.2d 428, 98 S.Ct. —] is comparable. The employees sought to distribute a four-part union newsletter. Two parts involved organizational requests; the other parts were irrelevant to the relations between employer and union.<sup>3</sup> A dissent by Justice Rehnquist, joined by Chief Justice Burger, states that property rights "explicitly protected from federal interference by the Fifth Amendment to the Constitution" were involved in the controversy. Rejecting that view, the majority had little difficulty recognizing that, as noted in *Hudgens, supra*, 424 U.S. at page 513 [47 L.Ed.2d at page 203], the National Labor Relations Act could provide statutory protection for the activity involved. The court observed that prior cases established that the act assures a right to distribute organizational literature on an employer's premises because employees already are rightfully there, to perform the duties of their employment. (See *Republic Aviation Corp. v. NLRB* (1945) 324 U.S. 793 [89 L.Ed. 1372, 65 S.Ct. 982, 157 A.L.R. 1081].) The court con-

<sup>3</sup> It was clear prior to *Eastex* that employees' right of self-organization included the right to distribute organizational literature on the employer's property. (*Eastex, supra*, 437 U.S. 556.) The two parts of the newsletter at issue were a request to write the Legislature opposing a "right-to-work" measure and an expression of opposition to a presidential veto of a minimum wage increase.



cluded, "Even if the mere distribution by employees of material . . . can be said to intrude on petitioner's property rights in any meaningful sense, the degree of intrusion does not vary with the content of the material." (*Eastex, supra*, 437 U.S. 556.)

The same may be said here. Members of the public are rightfully on Pruneyard's premises because the premises are open to the public during shopping hours. *Lloyd* when viewed in conjunction with *Hudgens* and *Eastex* does not preclude law-making in California which requires that shopping center owners permit expressive activity on their property. To hold otherwise would flout the whole development of law regarding states' power to regulate uses of property and would place a state's interest in strengthening First Amendment rights in an inferior rather than a preferred position. "[A]ll private property is held subject to the power of the government to regulate its use for the public welfare." (*Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 403 [128 Cal.Rptr. 183, 546 P.2d 687]; app. dism. for want of substantial federal question, 429 U.S. 802 [50 L.Ed.2d 63, 97 S.Ct. 33].)

Property rights must yield to the public interest served by zoning laws (*Village of Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365 [71 L.Ed. 303, 47 S.Ct. 114, 54 A.L.R. 1016]), to environmental needs (Pub. Resources Code, § 21000 et seq.), and to many other public concerns. (See, e.g., the California Coastal Act (*id.*, § 30000 et seq.), the California Water Quality Control Act (Wat. Code, § 13000 et seq.), the Subdivision Map Act (Gov. Code, § 66410 et seq.), and the Subdivision Lands Act (Bus. & Prof. Code, § 11000 et seq. See also Powell, *The Relationship Between Property Rights and Civil Rights* (1963) 15 Hastings L.J. 135, 148-149.)

"We do not minimize the importance of the constitutional guarantees attaching to private ownership of property; but as long as 50 years ago it was already 'thor-

oughly established in this country that the rights preserved to the individual by these constitutional provisions are held in subordination to the rights of society. Although one owns property, he may not do with it as he pleases any more than he may act in accordance with his personal desires. As the interest of society justifies restraints upon individual conduct, so, also, does it justify restraints upon the use to which property may be devoted. It was not intended by these constitutional provisions to so far protect the individual in the use of his property as to enable him to use it to the detriment of society. By thus protecting individual rights, society did not part with the power to protect itself or to promote its general well-being. Where the interest of the individual conflicts with the interest of society, such individual interest is subordinated to the general welfare." ' ' ' (*Agricultural Labor Relations Bd. v. Superior Court, supra*, 16 Cal.3d at p. 403, holding that use of private property may be restricted because of the public interest in collective bargaining, and quoting *Miller v. Board of Public Works* (1925) 195 Cal. 477, 488 [234 P. 381, 38 A.L.R. 1479].)

The *Agricultural Labor Relations Board* opinion further observes that the power to regulate property is not static; rather it is capable of expansion to meet new conditions of modern life. Property rights must be " 'redefined in response to a swelling demand that ownership be responsible and responsive to the needs of the social whole. Property rights cannot be used as a shibboleth to cloak conduct which adversely affects the health, the safety, the morals, or the welfare of others.' " (16 Cal.3d at p. 404, quoting Powell, *The Relationship Between Property Rights and Civil Rights, supra*, 15 Hastings L.J. at pp. 149-150.)

Several years have passed since this court decided *Diamond II*. Since that time central business districts apparently have continued to yield their functions more and more to suburban centers. Evidence submitted by appel-



lants in this case helps dramatize the potential impact of the public forums sought here:

(1) As of 1970, 92.2 percent of the county's population lived outside the central San Jose planning area in suburban or rural communities.

(2) From 1960 to 1970 central San Jose experienced a 4.7 percent decrease in population as compared with an overall 67 percent increase for the 19 north county planning areas.

(3) Retail sales in the central business district declined to such an extent that statistics have not been kept since 1973. In 1972 that district accounted for only 4.67 percent of the county's total retail sales.

(4) In a given 30-day period between October 1974 and July 1975 adults making one or more shopping trips to the 15 largest shopping centers in the metropolitan San Jose statistical area totaled 685,000 out of 788,000 adults living within that area.

(5) The largest segment of the county's population is likely to spend the most significant amount of its time in suburban areas where its needs and wants are satisfied; and shopping centers provide the location, goods, and services to satisfy those needs and wants.

In assessing the significance of the growing importance of the shopping center we stress also that to prohibit expressive activity in the centers would impinge on constitutional rights beyond speech rights. Courts have long protected the right to petition as an essential attribute of governing. (*United States v. Cruikshank* (1876) 92 U.S. 542, 552 [23 L.Ed. 588, 591].) The California Constitution declares that "people have the right to . . . petition government for redress of grievances . . ." (Art. I, § 3.) That right in California is, moreover, vital to a basic process in the state's constitutional scheme—direct initiation of

change by the citizenry through initiative, referendum, and recall. (Cal. Const., art. II, §§ 8, 9, and 13.) \*

To protect free speech and petitioning is a goal that surely matches the protecting of health and safety, the environment, aesthetics, property values and other societal goals that have been held to justify reasonable restrictions on private property rights.

#### DOES THE CALIFORNIA CONSTITUTION GUARANTEE THE RIGHT TO GATHER SIGNATURES AT SHOPPING CENTERS?

No California statute prescribes that shopping center owners provide public forums. But article I, section 2 of the state Constitution reads: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." Though the framers could have adopted the words of the federal Bill of Rights they chose not to do so. (See Note, *Rediscovering the California Declaration of Rights* (1974) 26 Hastings L.J. 481.) Special protections thus accorded speech are marked in this court's opinions. *Wilson v. Superior Court* (1975) 13 Cal.3d 652, 658 [119 Cal.Rptr. 468, 532 P.2d 116], for instance, noted that "[a] protective provision more definitive and inclusive than the First Amendment is contained in our state constitutional guarantee of the right of free speech and press."

Past decisions on speech and private property testify to the strength of "liberty of speech" in this state. *Diamond*

\* The Fair Political Practices Commission filed an amicus brief supporting appellants here. The commission urges that we consider the impact of our decision on exercise of the right to initiate change through the initiative, referendum, and recall processes. The brief points out that, because of the large number of signatures required to succeed in an initiative, referendum, or recall drive, guaranteeing access to voters is essential to make meaningful the right to mount such a drive.

I held that distributing leaflets and soliciting initiative signatures at a shopping center are constitutionally protected. Though the court relied partly on federal law, California precedents also were cited. (E.g., *Schwartz-Torrance Investment Corp. v. Bakery & Confectionary Workers' Union* (1964) 61 Cal.2d 766 [40 Cal.Rptr. 233, 394 P.2d 921]; *In re Lane* (1969) 71 Cal.2d 872 [79 Cal.Rptr. 729, 457 P.2d 561]; *In re Hoffman* (1967) 67 Cal.2d 845 [64 Cal. Rptr. 97, 434 P.2d 353].) The fact that those opinions cited federal law that subsequently took a divergent course does not diminish their usefulness as precedent. (*People v. Pettingill* (1978) 21 Cal.3d 231, 247 [145 Cal.Rptr. 861, 578 P.2d 108]; and see Cal. Const. Revision Com., Recommendations (1971) art. I, § 3, com., p. 17 ["Federal . . . legal precedents are subject to change and uncertain in scope"].) The duty of this court is to help determine what "liberty of speech" means in California. Federal principles are relevant but not conclusive so long as federal rights are protected.

*Schwartz-Torrance, supra*, 61 Cal.2d 766, held that a labor union has the right to picket a bakery located in a shopping center. The opinion noted that the basic problem is one of "accommodating conflicting interests: plaintiff's assertion of its right to the exclusive use of the shopping center premises to which the public in general has been invited as against the union's right of communication of its position which, it asserts, rests upon public policy and constitutional protection." (61 Cal.2d at p. 768.)

*In re Lane, supra*, extended the assurance of protected speech to the privately owned sidewalk of a grocery store. "Certainly, this sidewalk is not private in the sense of not being open to the public. The public is openly invited to use it in gaining access to the store and in leaving the premises. Thus, in our view it is a public area in which members of the public may exercise First Amendment rights." (71 Cal. 2d at p. 878.)

The issue arose too in *In re Hoffman* (1967) 67 Cal.2d 845 [64 Cal.Rptr. 97, 434 P.2d 353], where Vietnam War protesters had attempted to distribute leaflets in the Los Angeles Union Station, owned by three private companies. It housed a restaurant, snack bar, cocktail lounge, and magazine stand in addition to facilities directly related to transporting passengers. The public was free to use the whole station. Chief Justice Traynor's opinion made it clear that property owners as well as government may regulate speech as to time, place, and manner. (*Id.*, at pp. 852-853.) Nonetheless, "a railway station is like a public street or park." (*Id.*, at p. 851.) Further, "the test is not whether petitioners' use of the station was a railway use but whether it interfered with that use." (*Id.*) The opinion thus affirms that the public interest in peaceful speech outweighs the desire of property owners for control over their property. (See too *In re Cox* (1970) 3 Cal.3d 205, 217-218 [90 Cal.Rptr. 24, 474 P.2d 992]: "The shopping center may no more exclude individuals who wear long hair . . . who are black, who are members of the John Birch Society, or who belong to the American Civil Liberties Union, merely because of these characteristics or associations, than may the City of San Rafael.")

*Diamond I*, quoting *Schwartz-Torrance, supra*, stated: "[T]he countervailing interest which [the owner] endeavors to vindicate emanates from the exclusive possession and enjoyment of private property. Because of the public character of the shopping center, however, the impairment of [the owner's] interest must be largely theoretical. [The owner] has fully opened his [*sic*] property to the public. . . ." (*Diamond I, supra*, 3 Cal.3d at p. 662, bracketed material in original.)

In his *Diamond II* dissent Justice Mosk describes the extensive use of private shopping centers.<sup>5</sup> His observa-

<sup>5</sup> "The importance assumed by the shopping center as a place for large groups of citizens to congregate is revealed by statistics;

tions on the role of the centers in our society are even more forceful now than when he wrote. The California Constitution broadly proclaims speech and petition rights. Shopping centers to which the public is invited can provide an essential and invaluable forum for exercising those rights.

We therefore hold that *Diamond II* must be overruled. (See particularly 11 Cal.3d at p. 335, fn. 4) A closer look at *Lloyd Corp.*, *supra*, 407 U.S. 551, has revealed that it does not prevent California's providing greater protection than the First Amendment now seems to provide. We conclude that sections 2 and 3 of article I of the California Constitution protect speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned.

By no means do we imply that those who wish to disseminate ideas have free rein. We noted above Chief Justice Traynor's endorsement of time, place, and manner rules. (*In re Hoffman*, *supra*, 67 Cal.2d at pp. 852-853.) Further, as Justice Mosk stated in *Diamond II*, "It bears repeated emphasis that we do not have under consideration the property or privacy rights of an individual homeowner or the proprietor of a modest retail establishment. As a result of advertising and the lure of a congenial en-

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in 21 of the largest metropolitan areas of the country shopping centers account for 50 percent of the retail trade; in some communities the figure is even higher, such as St. Louis (67 percent) and Boston (70 percent). (Note (1973) Wis.L.Rev. 612, 618 and fn. 51.) Increasingly, such centers are becoming 'miniature downtowns'; some contain major department stores, hotels, apartment houses, office buildings, theatres and churches. (Business Week, Sept. 4, 1971, pp. 34-38; Chain Store Age, Sept. 1971, p. 4.) It has been predicted that there will be 25,000 shopping centers in the United States by 1985. (Publishers Weekly, Feb. 1, 1971, pp. 54-55.) Their significance to shoppers who by choice or necessity avoid travel to the central city is certain to become accentuated in this period of gasoline and energy shortage." (11 Cal.3d at p. 342 (dis. opn. of Mosk, J.).)

vironment, 25,000 persons are induced to congregate daily to take advantage of the numerous amenities offered by the [shopping center there]. A handful of additional orderly persons soliciting signatures and distributing handbills in connection therewith, under reasonable regulations adopted by defendant to assure that these activities do not interfere with normal business operations (see *Diamond I* at p. 665) would not markedly dilute defendant's property rights." (11 Cal.3d at p. 345 (dis. opn. of Mosk, J.).)

The judgment rejecting appellants' request that Pruneyard be enjoined from denying access to circulate the petition is reversed.

Bird, C. J., Tobriner, J., and Mosk, J., concurred.

RICHARDSON, J.—I respectfully dissent. The majority relegates the private property rights of the shopping center owner to a secondary, disfavored, and subservient position vis-a-vis the "free speech" claims of plaintiffs. Such a holding clearly violates federal constitutional guarantees announced in *Lloyd Corp. v. Tanner* (1972) 407 U.S. 551 [33 L.Ed.2d 131, 92 S.Ct. 2219].

The majority recites, in cursory fashion, that the trial court herein "rejected [plaintiffs'] request that Pruneyard be enjoined from denying them access." (*Ante*, p. 903.) Conspicuously absent from the opinion, however, is any reference to the trial court's careful findings of fact and conclusions of law, which are essential to a proper understanding and disposition of this case.

In brief, following a full evidentiary hearing, the trial court specifically found as follows: The Pruneyard Shopping Center is located entirely on private property, and its owner had adopted a nondiscriminatory policy of prohibiting all handbilling and circulation of petitions by anyone and regardless of content. Plaintiffs entered on Pruneyard property and sought to obtain signatures to petitions entirely unrelated to any activities occurring at the center. (The petitions were to the President of the United States



and the Congress opposing a United Nations resolution which condemned Zionism and attacking Syria's emigration policy.) Pruneyard is located in Santa Clara County which contains numerous forums for distributing handbills or gathering signatures, including "many shopping centers, public shopping and business areas, public buildings, parks, stadia, universities, colleges, schools, post offices and similar public areas where large numbers of people congregate." The court further found that numerous alternative public sites were available to plaintiffs for their purposes. Nonetheless, plaintiffs made no attempt whatever to obtain signatures on their petition in these alternative public areas, whether situated nearby or otherwise.

From the foregoing findings of fact the trial court expressly concluded as matters of law that there had been no dedication of the center's property to public use, that the center is not the "functional equivalent" of a municipality, and that "There are adequate, effective channels of communication for plaintiffs other than soliciting on the private property of the Center." On the basis of these findings of fact and conclusions of law, the trial court denied plaintiffs the injunctive relief which they sought.

With due deference, I suggest that the able trial court's judgment was not only entirely proper, but was compelled by the holdings in *Lloyd Corp. v. Tanner*, *supra*, 407 U.S. 551, and *Diamond v. Bland* (1974) 11 Cal.3d 331 [113 Cal. Rptr. 468, 521 P.2d 460] (cert. den. 419 U.S. 885 [42 L.Ed.2d 125, 95 S.Ct. 152]). The present majority, unable to escape the controlling force of *Lloyd*, acknowledges that "*Lloyd* held that a shopping center owner could prohibit distribution of leaflets when they communicated an information relating to the center's business and when there was an adequate, alternate means of communication." (*Ante*, p. 904.) However, the majority attempts to circumvent *Lloyd* by relying upon the "liberty of speech clauses" of the

California Constitution. I believe that such an analysis is clearly incorrect, because the owners of defendant Pruneyard Shopping Center possess *federally* protected property rights which do not depend upon the varying and shifting interpretations of state constitutional law for their safeguard and survival. Indeed, this was the precise effect of our own express holding in *Diamond v. Bland*, *supra*, wherein we stated with great clarity that "... we must reject plaintiff's proposal ... that we consider using the 'free speech' provisions of our state Constitution to reach a contrary result in this case. Even were we to hold that the state Constitution in some manner affords broader protection than the First Amendment to the United States Constitution ... , nevertheless supremacy principles would prevent us from employing state constitutional provisions to defeat defendant's federal constitutional rights." (11 Cal.3d at p. 335, fn. 4, italics added.) This constitutional principle is as sound today as it was less than five years ago when we last expressed it.

The application of our *Diamond* holding to the case before us is clear and inescapable. Nonetheless, the present majority now disavows *Diamond* and attempts to distinguish *Lloyd* as "primarily a First Amendment case" rather than a private property case. (*Ante*, p. 904.) Apparently, the majority now believes that *Lloyd* merely held that the leaflet distributors in that case lacked any *First Amendment* rights to assert against the shopping center owners, a deficiency the majority would now cure by creating more substantial "free speech" rights under the California Constitution than are recognized under the First Amendment.

The majority seriously errs in its excessively narrow reading of *Lloyd*, which expressed its fundamental reliance upon the *constitutional private property rights of the owner* throughout the entire opinion. This becomes apparent in the opening paragraph of *Lloyd*, wherein the high court, speaking through Justice Powell, explained that

"We granted certiorari to consider petitioner's contention that the decision below *violates rights of private property protected by the Fifth and Fourteenth Amendments.*" (407 U.S. at pp. 552-553 [33 L.Ed.2d at p. 133], italics added.) The court further observed that "The basic issue in this case is whether respondents, in the exercise of asserted First Amendment rights, may distribute handbills on Lloyd's private property contrary to its wishes and contrary to a policy enforced against *all* handbilling." (P. 567 [33 L.Ed.2d at p. 142], italics in original.) The *Lloyd* court carefully admonished that "It would be *an unwarranted infringement of property rights* to require them to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist. Such an accommodation would diminish property rights without significantly enhancing the asserted right of free speech." (*Ibid.* [33 L.Ed.2d, pp. 141-142], italics added.) This has precise application to the case before us for, as noted above, the trial court in the present case expressly found that plaintiffs had adequate alternative forums in which to conduct their activities. Contrary to the majority's thesis, *Lloyd* cannot be distinguished. It was, and is, a *property rights case of controlling force* in the litigation before us.

Recognizing the "special solicitude" owed to the First Amendment guarantees, the high court in *Lloyd* nonetheless noted that "this Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used non-discriminatorily for private purposes only." (P. 568 [33 L.Ed.2d p. 142].) Moreover, the court determined that although a *shopping center* is open to the public, "property [does not] lose its private character merely because the public is generally invited to use it for designated purposes." (P. 569 [33 L.Ed.2d, p. 143].) It is self-evident that the *federally* protected property rights are the same

whether the shopping center is in *Oregon*, as in *Lloyd*, or in *California*, as in the present case.

The *Lloyd* court acknowledged that considerations of public health and safety may justify an "appropriate government response" through police power regulations. (P. 570 [33 L.Ed.2d, p. 143].) However, "the Fifth and Fourteenth Amendment rights of private property owners, as well as the First Amendment rights of all citizens, must be respected and protected. The Framers of the Constitution certainly did not think these fundamental rights of a free society are incompatible with each other. There may be situations where accommodations between them, and the drawing of lines to assure due protection of both, are not easy. *But on the facts presented in this case, the answer is clear.* [¶] We hold that there has been no such dedication of Lloyd's privately owned and operated shopping center to public use as to entitled respondents to exercise therein the asserted First Amendment rights." (*Ibid.* [33 L.Ed.2d p. 143], italics added.)

The lesson to be learned from *Lloyd* is unmistakable and irrefutable: A private shopping center owner is protected by the *federal* Constitution from unauthorized invasions by persons who enter the premises to conduct general "free speech" activities unrelated to the shopping center's purposes and functions. Nor is the foregoing principle in any way diminished or affected by the fact that the claimed free speech rights are purportedly sanctioned by the California Constitution, given the overriding supremacy of the federal Constitution.

The familiar words of article VI, clause 2, of the United States Constitution reads as follows: "*This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or*



*laws of any State to the contrary notwithstanding.*" (Italics added.) The controlling import of the supremacy clause on the issue before us is readily apparent. The United States Supreme Court, interpreting the United States Constitution, has declared that an owner of a private shopping center "when adequate, alternative avenues of communication exist," has a property right protected by the Fifth and Fourteenth Amendments which is superior to the First Amendment right of those who come upon the shopping center premises for purposes unrelated to the center. In such cases, no state court, interpreting a state Constitution, including this court interpreting the California Constitution, can contravene such a federal constitutionally protected right. Thus, in this case, the majority is prevented from relying on the California Constitution to impair or interfere with those property rights. We are bound by the United States Supreme Court interpretations of the United States Constitution. More specifically, in a confrontation between federal and state constitutional interests, federally protected property rights recognized by the United States Supreme Court will prevail against state protected free speech interests where alternative means of free expression are available.

The federal cases decided in this area subsequent to *Lloyd* do not support the majority's holding. In *Hudgens v. NLRB* (1976) 424 U.S. 507 [47 L.Ed.2d 196, 96 S.Ct. 1029], the high court cited and quoted from *Lloyd* with obvious approval, and extended *Lloyd's* holding to encompass labor dispute picketing within a private shopping center. The picketers in *Hudgens* had argued that their free speech interests were paramount to the private property rights of the center owner, given the existence of a labor dispute with one of the center's lessees. The high court rejected the argument, relying upon *Lloyd*, and remanded the case to the National Labor Relations Board for disposition. Contrary to the suggestion of the majority herein, the remand to the NLRB was not an implied re-

jection of the property interests of the center owner, for it is well established (by a companion case to *Lloyd*) that the NLRB *must* uphold the owner's private property rights in such cases unless there has been an outright dedication of the center property to public use. (*Central Hardware Co. v. NLRB* (1972) 407 U.S. 539, 547 [33 L.Ed.2d 122, 128-129, 92 S.Ct. 2238].) As *Central Hardware* explains, and echoing *Lloyd*, to accept the premise that such a dedication occurs merely because private property is "open to the public" for commercial purposes would constitute "an unwarranted infringement of long-settled *rights of private property* protected by the Fifth and Fourteenth Amendments." (*Ibid.* [33 L.Ed.2d 122, 129], italics added.)

Nor does the recent case of *Eastex, Inc. v. NLRB* (1978) 437 U.S. 556 [57 L.Ed.2d 428, 98 S.Ct. —], assist the majority. There, the Supreme Court upheld the rights of *employees* to distribute certain organizational material at their work site. The distinction between the rights of employees and nonemployees in this situation is well recognized, as was expressly noted by the *Eastex* court itself: "The Court recently has emphasized the distinction between the two cases: 'A wholly different balance was struck when the organizational activity was carried on by employees already rightfully on the employer's property, since the employer's management interests *rather than his property interests* were there involved.' [Citing *Hudgens*, 424 U.S. 507, and *Central Hardware*, 407 U.S. 539, both *supra.*]" (Pp. 571-572 [57 L.Ed.2d p. 442], italics added.)

The majority correctly observes that "property rights must yield to the public interest served by zoning laws . . . , and to many other public concerns." (*Ante*, p. 906.) Yet the "zoning for free speech uses" which the majority attempts to accomplish today goes far beyond any traditional police power regulation. Such unprecedented fiat has no support

in constitutional, statutory or decisional law. The character of a free speech claim cannot be transmuted into something else by changing the label and invoking the police power. As noted above, the *Lloyd* case acknowledged that considerations of public health and safety may justify an "appropriate government response," but that "on the facts presented in this case, *the answer is clear.*" (407 U.S. at p. 570 [33 L.Ed.2d at p. 143], italics added; see also, *Euclid v. Ambler Co.* (1926) 272 U.S. 365, 395 [71 L.Ed. 303, 314, 47 S.Ct. 114, 54 A.L.R. 1016] [zoning laws, and other police power regulations, must have a substantial relation to the public health, safety, morals or general welfare].)

Because, as the trial court expressly found, plaintiffs had adequate public forums in which to conduct their activities, their unauthorized entries on Pruneyard property manifestly cannot be excused on the basis of any state policy or goal "to protect free speech and petitioning." (*Ante*, p. 908.) The *Lloyd* rationale is applicable and unanswerable. The majority may not evade it by resort, in this instance, to the California Constitution, which must yield to a paramount federal constitutional imperative.

The judgment should be affirmed.

Clark, J., and Manuel, J., concurred.

## APPENDIX D

FILED

MAY 23, 1979

G. E. BISHEL, CLERK

## Order Denying Rehearing

S. F. No. 23812

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

ROBINS ET AL., *Plaintiffs and Appellants,*

v.

PRUNEYARD SHOPPING CENTER ET AL.,  
*Defendants and Respondents.*

Respondents' petition for rehearing DENIED.

Clark, J., Richardson, J., and Manuel, J., are of the opinion that the petition should be granted.

/s/ BIRD

Chief Justice



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**APPENDIX E**

FILED

MAY 30, 1979

G. E. BISHEL, CLERK

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Action No. S.F. 23812

Superior Court # 349363

PRUNEYARD SHOPPING CENTER, et al., *Appellants*,

VS

MICHAEL ROBINS, et al., *Appellees*.

**Notice of Appeal to the Supreme Court of the United States**

SUPREME COURT

NOTICE IS HEREBY GIVEN that PRUNEYARD SHOPPING CENTER, et al., the Appellants above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of California,

E-2

reversing the denial of an injunction, entered in this action on May 23, 1979.

This appeal is taken pursuant to 28 U.S.C. 1257(2).

Dated: May 29, 1979.

RUFFO, FERRARI & McNEIL

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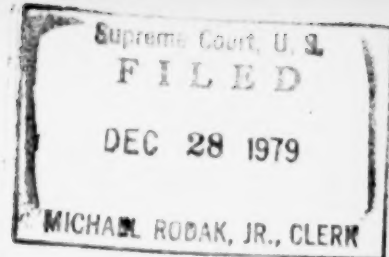
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By /s/ THOMAS P. O'DONNELL

Thomas P. O'Donnell

Attorneys for Appellants



**APPENDIX**

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1979

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**No. 79-289**

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PRUNEYARD SHOPPING CENTER and FRED SAHADI,  
*Appellants,*

v.

MICHAEL ROBINS, et al., *Appellees.*

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**On Appeal From the Supreme Court  
of the State of California**

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**JURISDICTIONAL STATEMENT FILED AUGUST 21, 1979  
JURISDICTION POSTPONED NOVEMBER 13, 1979**



IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1979

No. 79-289

PRUNEYARD SHOPPING CENTER and FRED SAHADI,  
*Appellants,*

v.

MICHAEL ROBINS, et al., *Appellees.*

On Appeal From the Supreme Court  
of the State of California

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### CHRONOLOGICAL LIST OF RELEVANT FILINGS

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4/7/76	Complaint for Preliminary Injunction
5/5/76	Answer to Complaint
6/16/76	Trial of Action
9/14/76	Findings of Fact and Conclusions of Law
9/14/76	Judgment Entered
9/30/76	Notice of Appeal to the District Court of Appeal of the State of California, First Appellate District
12/1/76	Clerk's Transcript on Appeal from the Judgment of the Superior Court of the State of California
5/19/77	Motion to Augment Record on Appeal from the Judgment of the Superior Court of the State of California
6/14/77	Order Granting Motion to Augment Record on Appeal
9/23/77	Supplemental Clerk's Transcript on Appeal from the Judgment of the Superior Court of the State of California
1/3/78	Opinion of Court of Appeal of the State of California in and for the First Appellate District
2/9/78	Petition for Hearing in the Supreme Court of the State of California
3/30/78	Order Granting Hearing in the Supreme Court of the State of California

<i>Date</i>	<i>Filing</i>
3/30/79	Opinion of the Supreme Court of the State of California Reversing Judgment of the Superior Court and Dissenting Opinion
3/30/79	Order Reversing Superior Court
4/16/79	Respondents' Petition for Rehearing
4/24/79	Respondents' Petition to Stay Issuance of Remittitur
5/7/79	Appellants' Answer to Petition to Stay Issuance of Remittitur
5/23/79	Order Denying Rehearing
5/23/79	Order Denying Stay of Remittitur
5/29/79	Notice of Appeal to the Supreme Court of the United States
5/29/79	Appellants' Application for Stay of Mandate of the Supreme Court of the State of California
6/4/79	Appellees' Response and Opposition to Application for Stay of Mandate of the Supreme Court of the State of California
6/12/79	Order Denying Stay of Mandate
8/21/79	Appellants' Jurisdictional Statement
10/23/79	Appellees' Motion to Dismiss
10/26/79	Appellants' Responses to Appellees' Motion to Dismiss
11/13/79	Order Postponing Consideration of the Question of Jurisdiction Until the Hearing on the Merits

The following findings, opinions, orders and notices appear in the appendix to the Jurisdictional Statement and have been omitted from this appendix:

Findings of Fact, Conclusions of Law and Judgment of the Superior Court, dated September 1976 .....	A-1
Opinion of the Court of Appeal, entered January 1978 .....	B-1
Opinion of the Supreme Court of the State of California, dated March 30, 1979 .....	C-1
Order of the Supreme Court of the State of California Denying Rehearing, filed May 23, 1979 ..	D-1
Notice of Appeal to the Supreme Court of the United States, filed May 30, 1979 .....	E-1



SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF SANTA CLARA

No. 349363

MICHAEL ROBINS, a minor, by his guardian ad litem, DAVID ROBINS, IRA DAVID MARCUS, a minor, by his guardian ad litem, FRED WERNER MARCUS, and ROBERTA BELL-KLIGLER, *Plaintiffs*,

v.

PRUNEYARD SHOPPING CENTER, and FRED SAHADI, individually and doing business as THE TOWERS VENTURE, and DOES I through V, inclusive, *Defendants*.

**COMPLAINT FOR PRELIMINARY INJUNCTION AND  
PERMANENT INJUNCTION**

Filed April 7, 1976

Plaintiffs, MICHAEL ROBINS, by and through his guardian ad litem, DAVID ROBINS, IRA DAVID MARCUS, by and through his guardian ad litem, FRED WERNER MARCUS, and ROBERTA BELL-KLIGLER, complain of defendants, and each of them, and for cause of action allege:

**I**

That heretofore the above entitled Court duly appointed DAVID ROBINS guardian ad litem for Plaintiff, MICHAEL ROBINS, and said DAVID ROBINS therefore brings this action as such guardian ad litem.

**II**

That heretofore the above entitled Court duly appointed FRED WERNER MARCUS guardian ad litem for plaintiff IRA DAVID MARCUS, and said FRED WERNER MARCUS therefore brings this action as such guardian ad litem.

**III**

Plaintiffs are and at all times herein mentioned were students and a teacher of the 1976 confirmation class at Temple Emanu-El in San Jose, California.

**IV**

Plaintiffs were engaged in a project of the confirmation class to circulate petitions to condemn a resolution passed by the United Nations, and to condemn Syria's policy of not allowing Jews to leave the country.

**V**

The Plaintiffs do not know the true names and capacities, whether individual, corporate, associate or otherwise, of the Defendants sued herein pursuant to the Code of Civil Procedure § 474 as DOE I through DOE V inclusive, and Plaintiffs will amend this Complaint to show their true names and capacities when the same have been ascertained.

**VI**

Defendant FRED SAHADI, and DOES I through V, inclusive, are the owners, operators, and agents thereof of the Pruneyard shopping center in Campbell, California, doing business as the "Towers Venture".

**VII**

At all times herein mentioned, each Defendant was the agent, servant and employee of each of the remaining Defendants, and was acting in the scope of his employment as such agent, servant and employee.

**VIII**

On or about November 16, 1975, and continuing to the present time, Defendants, and each of them, wrongfully and

unlawfully ejected the Plaintiffs from the premises of Defendants' shopping center while Plaintiffs were peacefully circulating the above-referenced petition.

## IX

As a proximate result of said wrongful conduct of Defendants, and each of them, and of the conditions wrongfully created thereby as aforesaid, Plaintiffs' First Amendment rights to peacefully collect signatures on petitions without obstructing the operation of the shopping center have been infringed.

## X

Plaintiffs have subsequently been refused permission by the Defendants' manager of the shopping center to engage in peaceful, non-obstructive First Amendment activities on the premises of the shopping center, and Plaintiffs were told that they would be ejected if they were to engage in such activities on the premises in the future. Unless and until Defendants' said threatened wrongful conduct is forthwith enjoined by this Court, Plaintiffs will continue to suffer said detriments and injuries and infringement of their rights.

## XI

Defendants' said wrongful conduct unless and until the same is forthwith is enjoined and restrained by order of this Court, will cause great and irreparable injury to Plaintiffs in that they have no adequate alternative means to circulate this petition in the City of San Jose or the surrounding area; that the most effective way for Plaintiffs to express their views and reach substantial numbers of people is at Defendants' shopping center.

## XII

Plaintiffs have no adequate remedy at law for said injuries in that they cannot be adequately compensated in damages for the loss of their Constitutional rights.

WHEREFORE, Plaintiffs pray judgment against the Defendants, and each of them, as follows:

1) For a preliminary injunction, and a permanent injunction, both enjoining Defendants and each of them and their agents, servants, and employees, and all persons acting under, in concert with, or for them:

(a) From denying Plaintiffs the right to exercise their First Amendment Rights by preventing them from coming upon Defendants' premises for the purpose of setting up non-obstructive card tables and circulating petitions in a peaceful manner.

(b) From ejecting Plaintiffs when exercising their constitutional rights on Defendants' premises.

2) For costs of suit; and,

3) For such other and further relief as to the Court seems just.

DATED: April 6, 1976

MORGAN, BEAUZAY, HAMMER,  
EZGAR, BLEDSOE & RUCKA

BY: /s/ PHILIP L. HAMMER  
Philip L. Hammer

BY: /s/ ANN M. RAVEL  
Ann M. Ravel

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SANTA CLARA

No. 349363

MICHAEL ROBINS, a minor, by his guardian ad litem,  
DAVID ROBINS, et al., *Plaintiffs*,

v.

PRUNYARD SHOPPING CENTER and FRED SAHADI, individually  
and doing business as THE TOWERS VENTURE, et al.,  
*Defendants.*

**ANSWER TO COMPLAINT**

Filed May 7, 1976

COMES NOW defendant FRED SAHADI, doing business as PRUNYARD SHOPPING CENTER, and in answer to the complaint on file herein, admits, denies and alleges as follows:

I

Commencing with the word "and" on Page 2, Line 15, through the word "country" on Page 2, Line 16, of Paragraph IV, answering defendant has no information or belief sufficient to enable him to respond to the allegations therein, and basing his denial on that ground, denies generally and specifically the allegations therein contained.

II

Answering Paragraph VI, answering defendant admits that FRED SAHADI is an owner of THE PRUNYARD. Answering defendant specifically denies that THE PRUNYARD does business as "The TOWERS VENTURE". Except as above set forth, answering defendant denies generally and specifically the allegations therein.

III

Answering Paragraphs VII and VIII, answering defendant denies generally and specifically the allegations therein contained.

IV

Answering Paragraph IX, answering defendant denies depriving plaintiffs of any First Amendment rights, and based on this denial, denies generally and specifically the allegations therein contained.

V

Answering Paragraphs X, answering defendant admits that THE PRUNYARD refused permission to plaintiffs to circulate petitions or leaflets, and other than as admitted, answering defendant denies generally and specifically the allegations therein contained.

VI

Answering Paragraph XI, answering defendant denies generally and specifically the allegations therein contained and affirmatively alleges that plaintiffs have many adequate alternatives means to circulate the petition in the City of San Jose and the surrounding areas, and based on his information and belief, affirmatively alleges that in fact said petition was widely circulated and signed in said areas.

VII

Answering Paragraph XII, answering defendant denies that plaintiffs have been deprived of any constitutional rights, and based on this denial, denies generally and specifically the allegations therein contained.

WHEREFORE, answering defendant prays judgment as follows:

1. That plaintiffs take nothing by way of their complaint on file herein.
2. For costs of suit incurred herein.



3. For such other and further relief as to the Court seems just and proper.

Dated: May 5, 1976.

RUFFO, FERRARI & McNEIL  
A Professional Corporation

By: /s/ THOMAS P. O'DONNELL  
Thomas P. O'Donnell  
Bradford C. O'Brien  
Attorneys for Defendant  
FRED SAHADI, doing business  
as PRUNEYARD SHOPPING  
CENTER

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SANTA CLARA

No. 349363

MICHAEL ROBINS, a minor, by his guardian ad litem,  
DAVID ROBINS, et al, *Plaintiffs*,

v.

PRUNEYARD SHOPPING CENTER and FRED SAHADI, individually  
and doing business as THE TOWERS VENTURE, et al.,  
*Defendants*.

**DECLARATION OF KEVIN SALMON**

Filed April 23, 1976

I, KEVIN SALMON, hereby declare as follows:

1. I am a resident of Santa Clara County.
2. I am the Manager of THE PRUNEYARD, located at the intersection of Bascom and Campbell Avenues in Campbell, California.
3. THE PRUNEYARD is entirely located on private property. Not including the Towers Office Buildings, it consists of approximately 21± acres of land, five of which are devoted to parking area and 16 of which are occupied by covered walkways, plazas, sidewalks and buildings containing more than 65 specialty shops, 10 restaurants and a cinema with three separate theater areas. Since THE PRUNEYARD was constructed, it has been devoted solely to commercial use. Members of the public are invited to visit THE PRUNEYARD for the purpose of patronizing the commercial establishments located therein. No activity is permitted on the premises occupied by THE PRUNEYARD complex which does not further the commercial purposes of the complex and/or contribute to an atmosphere conducive to bringing supplier and consumer together.

4. The design of the Center, the landscaping, the availability of specialty shops, entertainments and restaurants have all been planned, laid out and selected by the Center to create a controlled, quiet and unharried atmosphere where consumers may come to shop and enjoy themselves (see the brochure attached hereto as Exhibit A).

5. THE PRUNEYARD is intended to present a unique and entertaining shopping environment that does not have the noise or distractions of the ordinary public business district. To preserve this environment, the management of THE PRUNEYARD allows on the premises only such activities as will benefit the commercial well-being of the Center and its tenants, together with the safety and comfort of shoppers and invitees. I attribute the complex's singular success to the maintenance of this unique environment.

6. It is the policy of THE PRUNEYARD not to permit any visitor or tenant to engage in any solicitations, the circulation of petitions for any cause, the making of speeches in support of any cause, the gathering of signatures, the distribution of political, religious, or other kinds of literature which are not directly related to the commercial purposes of THE PRUNEYARD. This policy is and has been enforced strictly and on a non-discriminatory basis in order to preserve the environment of THE PRUNEYARD and to prevent it from becoming like a public forum or an ordinary downtown business district.

7. THE PRUNEYARD does not attempt to prevent any of the activities described in Paragraph 6 above from occurring on the public sidewalks and streets adjoining the Center, and in fact such activities have from time to time occurred there without interference and THE PRUNEYARD has from time to time advised people of their rights to do so.

8. The Center employs its own security forces to keep order and security in the Center.

9. THE PRUNEYARD is not a regional center, but instead is a medium sized specialty center located one block from downtown Campbell, one block from a public park, very close to the Campbell Civic Center and Public Library.

10. The area surrounding THE PRUNEYARD contains numerous traditional public shopping districts and public buildings located on public streets, such as the Willow Glen shopping district in San Jose, the Town of Los Gatos, the Regional Post Office Headquarters and the Department of Employment Office.

The Greater San Jose Area is filled with numerous public buildings, stadia, shopping districts, parks, theaters, museums, post offices, schools, colleges and universities upon and at which the activities described in Paragraph 6 above are allowed and/or encouraged.

11. THE PRUNEYARD is clearly separated from all public streets by curbing and landscaping. The entrances to the Center are all posted and signed with specially made non-public signing clearly different than state, county or city signs. The parking lots of the Center are treated as private property by the local police pursuant to State law (see for example, PC § 602).

12. All upkeep and repairs of all common areas, such as driveway, walkways, plazas, etc., are paid for by private rather than public funds.

I declare under penalty of perjury that the foregoing is true and correct, and if called upon as a witness, I could testify competently thereto.

Executed at San Jose, California, this 23 day of April, 1976.

/s/ KEVIN SALMON  
Kevin Salmon

EXCERPTS FROM REPORTER'S TRANSCRIPT OF  
PROCEEDINGS IN THE SUPERIOR COURT  
OF THE STATE OF CALIFORNIA

PROCEEDINGS

10:30 a.m.

[2] THE COURT: The matter of Robins, et al., versus Pruneyard Shopping Center.

This is a Complaint for an injunction seeking to enjoin the defendants from denying access to persons seeking to exercise their First Amendment rights by way of partition.

The Court has discussed the case as far as its broad outline with counsel in chambers and we are ready to proceed.

MR. HAMMER: Make our appearances?

THE COURT: Yes.

MS. RAVEL: Ann Miller Ravel appearing for the plaintiff.

MR. HAMMER: Philip Hammer also for the plaintiff.

MR. O'DONNELL: Thomas O'Donnell appearing for the defendant.

Your Honor, I think we have a few matters of agreement that it might be appropriate to mention to the Court at this time.

THE COURT: Yes?

MR. O'DONNELL: I believe the parties agree that the Pruneyard Shopping Center, which is the site of this question, is indeed privately owned; it is located in the city of Campbell.

I believe we agree that Mrs. Ravel's clients did in fact go there on the dates alleged, did attempt to obtain [3] signature on petitions, and I'm not sure, perhaps hand out pamphlets.

Were they also doing that?

MS. RAVEL: I believe so.

MR. O'DONNELL: Okay. That they were advised by representatives of the Pruneyard that this conduct was not allowed at the Pruneyard, and that they would have to cease that activity, and in fact, then did cease the activity and leave the premises.

I don't know if counsel is prepared to stipulate or not: It is our contention, and I think there is no factual dispute, that the petitions being circulated in the First Amendment activities were unrelated to the Center activity; is that also correct?

MS. RAVEL: We're willing to stipulate to that.

MR. O'DONNELL: And no permission had in fact been given to the plaintiffs to distribute or seek petitioners.

MS. RAVEL: That's correct.

MR. O'DONNELL: I think that states where we agree.

MS. RAVEL: We also agree that there are some shopping centers in the San Jose area that do permit the exercise of First Amendment rights, and there are some that do not permit it.

THE COURT: Excuse me a moment. I am not sure I got all of your last point. That is, that the petitions [4] which were sought to be circulated and the literature which was sought to be circulated was unrelated to the Pruneyard activity?

MR. O'DONNELL: Shopping Center Activity. We're here simply making a distinction that rests on the labor cases where the courts have said if you picket a store that is located on the premises and therefore the picketing is related to the business, you can do so. It is not the plaintiffs' contention that this type of First Amendment activ-



ity that they were doing was related to the activities of the Center.

THE COURT: Wasn't there another function mentioned?

MR. O'DONNELL: Yes, the last one she reminded me of, we took a survey of some of the centers located in the area, and I think for the record I might state what we have agreed to. I think the Court is familiar with most, if not all, the centers.

We determined whether some of these centers allowed the handing out of pamphlets and signing of petitions, and we have agreed that the Almaden Fashion Plaza, Valley Fair, and Mayfield Mall, and Westgate, all do allow this type of activity.

On the other hand, Stanford Shopping Center, because of a Palo Alto City Ordinance against it, does not; Stevens Creek Plaza, they generally would not allow; San Antonio, Oakridge, and Town and Country, all do not.

[5] Anything else?

MS. RAVEL: Well, there are other shopping centers.

THE COURT: Stanford Shopping Center?

MR. O'DONNELL: Stevens Creek Plaza.

THE COURT: San Antonio—

MR. O'DONNELL: Oakridge and Town and Country.

THE COURT: Town and Country San Jose?

MR. O'DONNELL: I believe Town and Country—I get confused.

THE COURT: There is a Town and Country-Palo Alto and Town and Country-San Jose.

MR. O'DONNELL: Yes. I got confused whether it's Santa Clara or San Jose, but it's across the street from Valley Fair.

MS. RAVEL: We also agree there are other shopping centers that we did a study of, and some permit and some do not permit it. This is not an exhaustive list, and some of the shopping centers that do allow it have various restrictions.

MR. O'DONNELL: I think—again I don't know—I would think it would be appropriate at this time as far as an opening statement is concerned, I would want to make one, and I assume Ann will make hers.

THE COURT: You want to make opening statement?

MS. RAVEL: Yes, Your Honor.

THE COURT: All right. Excuse me a moment.

[6] (Interruption.)

THE COURT: All right. Now, before opening statements, let's be sure the Court understands what you stipulated.

First, that the Pruneyard Shopping Center is a privately owned center located in the city of Campbell;

Second, that the plaintiffs went to the Pruneyard seeking signatures on petitions and seeking to hand out pamphlets;

That upon arrival at the Center the plaintiffs were advised by the owners of the Center that they were not allowed to engage in these activities at the Center; that they must cease and desist in what they were doing;

That they did stop and left the Center as requested;

That the petitions which the plaintiffs were seeking to circulate and the literature which they were seeking to circulate was unrelated to the activity of the Pruneyard or any of its businesses;

That a survey has been done of the centers in the Santa Clara Valley, and the survey indicates that Almaden, Valley Fair, Mayfield Mall and Westgate allow such activity;

Stanford Shopping Center, Stevens Creek Plaza, San Antonio Shopping Center, Oakridge, Town and Country, do not allow such activity;

That Stanford does not allow it because of local ordinance, apparently;

That in addition, there has been further survey of [7] other centers by the plaintiffs and this survey showed that some allowed and some did not allow, and some of those that did allow allowed with certain restrictions.

. . . . .

[11] **Ira David Marcus.**

called as a witness on behalf of the Plaintiffs, being first duly sworn, was examined and testified as follows:

**THE CLERK:** State your full name, please, and spell your last name.

**THE WITNESS:** My name is Ira David Marcus, M-a-r-c-u-s.

**DIRECT EXAMINATION**

**BY MS. RAVEL:**

**Q.** Are you one of the plaintiffs in this case, Mr. Marcus?

**A.** Yes, I am.

**Q.** Could you give us your age?

**A.** 16.

**Q.** Do you recall what you did on November 16, 1975?

**A.** Yes, some other students and my confirmation classes, and one of our teachers and I went to—we were going to try to get signatures on a petition for Syrian Jews, and for a U.N. resolution, and to protest that resolution, so we decided the best place we could go, the easiest, would be [12] the Pruneyard Shopping Center.

**Q.** So you went to the Pruneyard Shopping Center that day?

**A.** Yes.

**Q.** Do you remember what day it was?

**A.** It was a Saturday.

**Q.** Are you a student?

**A.** Yes.

**Q.** Is the only day that you have to do this kind of activity a Saturday or Sunday?

**A.** Yes.

**Q.** What were you going to do with the petition which you—after you had circulated them?

**A.** Send them to various people. One was to President Ford; there's a couple to President Ford, and congressmen and such like that, and one was to get telegrams, too.

**Q.** How many people were in the group that went with you to the Pruneyard?

**A.** Myself, four other students and a teacher.

**Q.** What was your reason for selecting the Pruneyard?

**A.** We thought that's where we could reach the most amount of people.

**Q.** Did you have any self-imposed rules before you went to the shopping center?

**A.** We went—

**MR. O'DONNELL:** Well, I would object to that as not being relevant. There is no contention, and we don't make it, that this gentleman or any with him caused any disturbance.

[13] **THE COURT:** That apparently is not an issue. Was that the point you were getting at with the self-imposed rules?

**MS. RAVEL:** Yes, but we would like to make it clear to the Court that the plaintiffs were extremely orderly and their intention was to be orderly and to follow any rules. Although they're not claiming that they caused any disturbance, we want the Court to be aware that our clients

intended to follow any regulations that may have been imposed.

THE COURT: I see. Perhaps they are willing to stipulate that the question of orderliness or disorderliness is not an issue in the matter.

MR. O'DONNELL: It's not an issue. Certainly their intention is not. They could have intended anything, but we could only judge by their signs. As far as we were concerned, they are orderly.

THE COURT: I agree that I don't think their undisclosed intent—it is what happened when they got there. If there were anything that would be at issue which would count, so perhaps we can move into something else. Most of these issues have been agreed to so far, haven't they?

MR. O'DONNELL: I believe so.

MS. RAVEL: Yes, but we wanted to make it clear exactly what did happen.

THE COURT: Sure. All right, go ahead.

[14] MS. RAVEL: For the record. Thank you.

Q. (By Ms. Ravel) Mr. Marcus, what was your reason for not going to downtown San Jose?

MR. O'DONNELL: Your Honor, again I'm going to object to that as not being relevant. Why he didn't go to downtown San Jose I don't see the relevancy.

THE COURT: Objection overruled. You may answer.

Q. (By Ms. Ravel) Answer the question, please.

A. We didn't think we could reach enough people in downtown San Jose. Downtown San Jose is a-flocking these days, so we thought it wasn't—first of all it was a lot farther away, and it wasn't so far away but it was not worth going there and wasting our time where there's hardly any people to get signature.

Q. What was your reason for not going to Willow Glen?

A. Same reason. We couldn't reach enough people there.

Q. And the same reason that you didn't go to Campbell?

A. Yes.

Q. When you arrived at the Pruneyard, what did you do?

A. Well, we set up a table and like an amphitheater they have, and we had a couple of petitions there, and I don't remember passing out anything. We might have; I don't remember if we did. I don't think so, and we sent two people around to different parts of the shopping center just to ask people if they would like to sign, and then we had two people standing in front of our table and we had somebody [15] sitting down there.

Q. Were you able to distribute any petitions and get signatures while you were there?

A. Yes, people were bringing open-handedly; they were signing.

Q. How long was it before you were told to leave?

A. I would say between five and ten minutes.

Q. Okay. Did you attempt to collect any signatures after you were told to leave on the streets that surrounded the shopping center or the sidewalk?

A. No. We didn't go to the sidewalks. It was really—it's hard to get—still in the sidewalks there's really not a heck of a lot of people in front of that place, you know. People go there in their cars and leave, and also we didn't—we have three people on the sidewalk. The sidewalk gets clogged and people don't want to be shoved around, so they feel uneasy about signing because they're kind of standing in the way. It's not a nice place to get signatures. It just doesn't work out.

MS. RAVEL: I have nothing further.

THE COURT: Cross-examination?

MR. O'DONNELL: Thank you, Your Honor.



## CROSS-EXAMINATION

BY MR. O'DONNELL:

Q. Mr. Marcus, how old are you?

A. 16.

Q. Have you done this type of activity before?

[16] A. Yes.

Q. Where have you?

A. Not recently, but I have before.

Q. In the past when you have done it, where have you gone?

A. We went to the Payless-Albertson's Shopping Center on Prospect Road. That was many years ago.

Q. Were you allowed to hand out your pamphlets or seek your signatures at that time?

A. Yes. Yes, we were. It was first Cub Scout thing, and we were allowed to stay out in front of there, but it was an important matter and we didn't reach very many people.

Q. Were you told prior to going into the Pruneyard that you had permission to go there?

A. Yes, we were under—we thought we did have permission. One of our teachers said we did; she was mistaken, I guess.

Q. She in fact told you she called the police department to determine if she could go into Campbell and Pruneyard and hand out petitions?

A. I don't know if she called the police; I don't think she did. My understanding was that she had talked to the manager of the Pruneyard and okayed it with him—her—him.

Q. After you left the Pruneyard, did you try to obtain signatures at any subsequent time or place?

A. Yes, we went to the Westgate Shopping Center. We went inside the mall and as soon as we got there we got kicked out of there, too.

[17] Q. Did you go to any place before or after the Pruneyard that was not a shopping center?

A. No.

Q. Were you a part of a larger drive in attempting to get the signatures within your Temple?

A. Yes.

Q. And did your Temple get a number of signatures?

A. I'm not sure what the final outcome was. We did okay ourselves. People were out at the airport, too.

Q. You say you did okay; what do you mean?

A. I mean considering that wherever we went we didn't stay long enough for the time that we did spend in one place, we did fairly well by collecting signatures. We got a page or so, but the time we were allowed we did as best we could in the time allowed. Put it that way.

Q. I lost you. Were you asked to leave a number of places?

A. We were inside the Westgate Mall. Besides Pruneyard, the only place we were asked to leave was inside Westgate Mall itself. After we got kicked out of there we went in front of the mall and there we got some signatures—not very many.

Q. Do you know how many people frequent downtown San Jose on a given day?

A. When I see it, there's not very many. I can't give you an exact figure.

Q. Did you ever try to hand out petitions or pamphlets in downtown San Jose?

A. No, I haven't.

Q. Have you ever gone to the main post office in San Jose and set up a booth or a stand to hand out petitions?

[18] A. No.

Q. Have you ever gone to a public event, a basketball game, football game, something like that, to hand out petitions?

A. No.

Q. Did you, when you were asked to leave Westgate and Pruneyard, attempt to go to a public place and have your petitions signed?

A. There's other groups of us doing that, and so we didn't.

Q. Did the Temple in fact gain thousands of signatures?

A. I don't know what the original outcome was, what the outcome was.

Q. Now, you say it was your opinion that it was most convenient for you to go to the Pruneyard?

A. Yes.

Q. And what was the basis of that convenience?

Let me rephrase it: Where do you live in relation to the Pruneyard?

A. Well, I live fairly close, but the point was not where you live but where we were assembling, and that's pretty convenient to the Temple.

Q. You assembled at your Temple?

A. Yes.

Q. The Temple is in San Jose?

A. Yes.

Q. And then you drove out to Campbell?

A. Yes.

Q. You say you don't think Willow Glen would have been as effective a place to hand out pamphlets; is that correct?

A. Yes.

[19] Q. Do you know how many people frequent Willow Glen on a Saturday?

A. Not the exact number, no.

Q. Do you know—what do you base your opinion that it wouldn't be effective to put up a table on a public street in Willow Glen to obtain signatures?

A. Because I've seen that area and compared the Pruneyard, from my observations, not as many people frequent Willow Glen as the Pruneyard.

Q. You say you've seen the area and from your observations do you know anything about the total hours spent in both locations?

A. No.

Q. Do you know anything about the total foot traffic in both locations on any given day?

A. No, not in numbers, no.

Q. And the last time you gave out petitions was some years before this particular incident?

A. Yes, but others in our group had given them out more recently.

Q. And they're the ones who told you it was ineffective to go into Willow Glen?

A. Yes.

Q. And did they also tell you it was ineffective to go to Los Gatos?

A. I don't think we brought up Los Gatos; I don't remember.

Q. How about Saratoga?

A. People were saying there wasn't enough people in Saratoga.

[20] Q. Do I understand that the only thing you were doing, because there was some confusion in my mind to start with. I thought you might have been handing out pamphlets. You were not handing out pamphlets?

A. No. We might have—I wasn't—the group that I was with was not handing out pamphlets. There might have been a couple that went astray handing them out, but the couple I was with were only collecting signatures. That's it.

Q. Now, there is a sidewalk on the exterior of the Pruneyard, is there not?

A. Yes, there is.

Q. And you did not go out to the sidewalk to attempt to contact people coming into the Pruneyard?

A. That's correct.

Q. Did one of the security officers at the Pruneyard tell you that you could do that?

A. Yes, he did.

Q. Suggested you move out there and continue with what you were doing?

A. Yes.

Q. You didn't try it?

A. It would have been ineffective we felt.

Q. You didn't try it, though; is that correct?

A. No, we didn't try it.

MR. O'DONNELL: I have nothing further.

# REDIRECT EXAMINATION

BY MS. RAVEL:

Q. Mr. Marcus, do you feel that the Temple has a number of such issues that come up in your confirmation class, or in [21] the Temple generally, that would require you or that you would be interested in passing out petitions about?

A. Yes.

MR. O'DONNELL: I object to that question as unintelligible, and secondly, what he feels I don't believe is relevant.

MS. RAVEL: I will rephrase the question.

THE COURT: All right, the question is withdrawn.

Q. (By Ms. Ravel) Is the Temple regularly interested in political decisions that affect Jewish people?

A. Yes.

MR. O'DONNELL: Your Honor, I object to that. I don't know if the witness is qualified to tell us the opinions of the Temple, nor do I think that's relevant to the matter before the Court.

MS. RAVEL: I didn't put it in terms of the feeling of the Temple. He is a member, and he is aware of what the activities of the Temple are.

THE COURT: Objection overruled. You may answer.

A. Yes, the Temple is interested.

Q. (By Ms. Ravel) Do you believe that there will be occasions in the future that will arise where you will want to have petitions signed by people concerning these issues?

MR. O'DONNELL: Your Honor, that calls for speculation. I object. Also, it's not relevant.

THE COURT: Well, you may answer. Objection [22] overruled.

THE WITNESS: Can you repeat the question one more time?

Q. (By Ms. Ravel) Do you believe that in the future you will be interested in passing out petitions on political issues?

A. Yes, definitely.

Q. Would you be interested in passing out petitions in the future on the issues that you passed out petitions that day at the Pruneyard?

A. Yes.

MS. RAVEL: I have nothing further.

THE COURT: Further questions?

MR. O'DONNELL: Yes.

# RECROSS EXAMINATION

BY MR. O'DONNELL:

Q. I understand that one of the petitions that you sought to have signed concerned itself with the Zionist resolution?

A. Yes.

Q. Is that still a live issue?

A. What do you consider a live issue?

Q. I'm asking you, do you consider it a live issue?

A. Yes.

Q. What do you mean by "a live issue"?

A. I mean that the resolution is still there, and that they haven't—they still consider Zionism racism. They haven't changed that, what they said before, and so until that's changed, we won't be happy.

[23] Q. Now, this took place last fall, did it not?

A. Right.



Q. When was the last time you went out on Zionism resolution?

A. We haven't gone out since then.

Q. When do you plan on going out next?

A. When we find where we can go. I guess we can get people. Again there is also other classes that I think might be interested in going out.

Q. My question is when did you plan on going out again?

A. As soon as I find out where and when we can get enough people. I can't give you an exact date.

Q. You understand that you can go to public places and seek petitions?

A. Yes, if we want to waste our time on small crowds.

Q. Do I understand you only want to go where you have massive numbers of people so it's very easy to collect petitions?

A. That's correct.

Q. In the fall did you go to any of the Stanford football games?

A. No—oh, to collect petitions?

Q. Yes.

A. No.

Q. How about the San Jose State games?

A. No.

Q. Just shopping centers?

A. That's correct, and airport, I think a group went out to an airport.

Q. How did you do at the airport?

A. I don't know. I think they might have got kicked out of [24] there, too. I didn't talk to too many people that went there.

Q. Do you have any idea of the number of people who go to the San Jose Airport in a year?

A. No.

MR. O'DONNELL: I have nothing further.

MS. RAVEL: That's all.

THE COURT: Further questions?

# REDIRECT EXAMINATION

BY MS. RAVEL:

Q. Mr. Marcus, do you know when the football season is over.

A. No, I don't know the exact day.

Q. Do you sometime in the fall—

A. Yes. Let's see. I think before New Year's.

MR. O'DONNELL: Sometimes it's never over.

THE WITNESS: Well, the final games take part before New Year's, but the home games are well before that.

MS. RAVEL: Thank you.

MR. O'DONNELL: Nothing further.

THE COURT: All right. Thank you. You may step down.

• • • • •

Clifford O. Lawler

[29] BY MS. RAVEL:

Q. Mr. Lawler, I show you this document entitled "A Comparative Study of Population Growth Characteristics versus Spending Patterns for Metropolitan San Jose for Years 1950-1975"; do you recognize this document (handing exhibit to the witness)?

A. Yes, ma'am.

Q. Did you prepare this document?

A. Yes, ma'am.

[30] Q. Did you prepare this document?

A. Yes, ma'am.

MS. RAVEL: I'd like this marked for identification.

THE COURT: It may be marked for identification as Plaintiffs' next in order.

THE CLERK: Marked Plaintiffs' 2 for identification.

(Whereupon, the above-mentioned document, being a Study of Spending Patterns, was marked Plaintiffs' Exhibit Number 2 for identification.)

Q. (By Ms. Ravel) Mr. Lawler, could you please tell me what sources you relied upon in your preparation of this document?

A. Yes. Information from the U.S. Bureau of Census, which I receive from the Santa Clara County Planning Commission, and from the San Jose City Planning Department, and also from the San Jose Mercury News Marketing Department and, of course, definitional material from other text books regarding government sources, Urban Institute, and so on.

Q. Those are all of the sources that you consulted in your preparation?

A. Yes.

Q. Would you explain by what method you reached your conclusions?

A. Well, the research study of this type which I call a descriptive study is very important to define the universe, and in this case the universe, as has been mentioned before here, is known as the Standard Metropolitan Statistical Area of San Jose, which does [31] include all of Santa Clara County by government definition. That is the universe; that's the population that we're talking about, so with that in mind, the idea was to find out where the people live now, where they have lived in years gone by, and what the ever-widening, ever-changing pattern of where people live, and my study encompasses the years 1950 through 1974, really. They call it '75 information, but it's 25 years.

Also, along with that, very important to find out where people spend their money, and I'm sure you realize that in studies involving consumer behavior, consumer attitudes, if they—they will spend time, significant amounts of their time where they get their one-spend needs satisfied, that was the purpose of drawing these two pieces of—major pieces of information together.

Q. Your Section 1 of your study is entitled "Comparisons of Growth Characteristics in Metropolitan San Jose and Where People Live". Could you please give me an

analysis of what is contained in Section 1 and what your conclusions are?

A. Yes. We simply show in Section 1 that over the years 1950 to 1975 population shows a fourfold increase from 291,000 to 1,169,000. Over 71 percent of this was by immigration, people coming from outside the area, and a lot of them from outside of the state. The remaining percentage, 28, 29 percent, was by virtue of marriage and of the indigenous local population.

[32] Q. I'm sorry to interrupt you—

A. Yes!

Q. Does your report in Section 1 show shifting population patterns in the county?

A. Yes. That was going to be my next point. That over that period of time it has shifted dramatically from what is described in one very important appendix, showing the downtown central district definition given by the San Jose Mercury News as a central district, which over the period of 1960 to 1970 has reduced 4.7 percent, whereas all of the other areas in the county which, if you don't mind, it's called SMSA. That is the standard metropolitan area we're talking about, is a plus 67 percent in all other areas.

One area particularly, 1883 percent. Several of them 300 and over 300 percent, over 200 percent, so on and so forth, combined average being 67 percent.

MS. RAVEL: Your Honor, I don't know if you'd like to follow along his testimony?

THE COURT: Do you have an extra copy?

MS. RAVEL: No, but—

THE COURT: Well, you go ahead. Is this document going to be offered in evidence and objected to, and where are we?

MS. RAVEL: Yes.

MR. O'DONNELL: I think perhaps we could save a lot of time. I am going to object to the testimony, and I think

Ann and I simply—we both looked at this and we know [33] what he is going to testify to, as not being relevant. As I understand his testimony, his testimony will be that downtown San Jose no longer as a marketing center is very viable, that he will show that of over \$3 billion of sales, something like 510 million of those dollars are in 45 shopping centers, and we don't really argue with that.

I think that is probably self-evident. We're not really quite sure how that's relevant, what they're saying, only on that basis do we object to his testimony.

THE COURT: All right, the objection is overruled.

Now, can we speed the matter up by putting the report in rather than go through the oral testimony?

MR. O'DONNELL: If we just perhaps asked a few questions about his conclusions and ask the conclusions, then the whole report can go in.

THE COURT: Why don't you just ask him about his conclusions and he can cross-examine him on them.

MS. RAVEL: Fine.

Q. (By Ms. Ravel) Mr. Lawler, could you please tell the Court what your conclusions were in Section 2, which is entitled "Spending Patterns, Metropolitan San Jose"?

A. Yes. Conclusions to Section 2 include these four statements:

"A phenomena of the rapid growth of major shopping centers, both in terms of dollars and in percent of sales, shown by Appendix, shows that the entrepreneurs of [34] Metropolitan San Jose are dedicated in some measure to the newer marketing concept, 'We are in a business to serve a market; we are not in business to sell a product.' Total consumer orientation. They are going to serve people where people live and where they are willing to go.

"It is the writer's belief that businessmen have found that people" which we call "spending units" here, "are

willing to shop and to spend a significant amount of their time in shopping centers, or synonymous with trading area where they live, providing that their wants and needs can be satisfied."

"The analysis provided in this report shows the overwhelming percentages of people in Metropolitan San Jose live outside the central district. It also shows they spend the largest portion of their incomes outside the central district. The availability of goods and services in any comparison shows the largest share of people are thus likely to spend the most significant amount of their time in the suburban areas where their wants and needs are satisfied."

So, to sum up, "The shopping center complexes provide the location, the availability of goods and services, and thus the satisfaction of consumer wants and needs."

Q. Mr. Lawler, could you please tell me the differences between the downtown area in terms of sales and the shopping centers?

A. The last figures that we have been able to get are [35] dated 1972. The reason we don't have later figures—

MR. O'DONNELL: Excuse me. I will have no objection to the report going in if that will help at all.

THE COURT: Maybe that will save a lot of time.

All right, the report is ordered admitted as Plaintiffs' Exhibit 2 in evidence.

(Whereupon, Plaintiffs' Exhibit Number 2, previously marked for identification, was received in evidence.)

THE COURT: Any other questions of the witness?

MS. RAVEL: No, Your Honor.

THE COURT: All right, you may cross-examine.



## CROSS-EXAMINATION

BY MR. O'DONNELL:

Q. I just want to establish a few things with you, sir.

You were previously deposed; I'm just wondering if we can determine in fairly short order what your area of expertise is, and what your study concerned and what it didn't concern. I believe that you have previously stated that you were asked a—let me show you your deposition. I believe your expertise here is unrelated to where people are most disposed to sign petitions? You're not offering any testimony on where somebody would be better situated to want to sign a petition; is that correct?

A. That's correct.

Q. You make no statement as to whether or not a person [36] would be more amenable to signing a petition in an airport versus a shopping center, do you?

A. In my deposition you asked me the same question.

Q. No, I'm not asking about your deposition; I'm asking about your field of expertise. Do you consider yourself an expert—

A. I do not.

Q. All right.

A. I do not.

Q. Your area of expertise insofar as you're concerned here today is determining where dollars are spent by consumers in commercial ventures; that's part of what you're to do; is that correct?

A. That's one-half of it.

Q. What is the other half?

A. Of where they live and what has been happening over a period of 25 years to this whole area.

Q. Now, I think your study disclosed—I'm not testing your memory.

A. That's all right.

Q. That in the Santa Clara County area there were over \$3 billion in commercial sales in a given year?

A. If that year was three years ago, it's better than 5 billion now.

Q. Going back to what your report said, and I guess that was three years ago?

A. Yes.

Q. I think you also stated that of that 3 billion plus total, something in excess of 500 million were obtained from the 45 most significant shopping centers?

A. Yes (nodding head).

[37] Q. You'll have to answer audibly for the Reporter.

A. Yes. That's correct.

Q. Then approximately \$2½ billion this would be spread out over different types of commercial ventures; is that right?

A. Yes, sir.

Q. I believe—let me ask you this: Is it also fair to say—

THE COURT: Excuse me, 3 billion in retail sales?

THE WITNESS: Yes, sir.

Q. (By Mr. O'Donnell) Would it be fair to say that if a person goes to a shopping center, as far as your work indicates, that same person may go to another center within the same day?

A. If they have a need to.

Q. So people will move on occasion from center to center?

A. Shopping center to shopping center. You might qualify that by defining shopping centers, and specifically Pruneridge—Pruneyard Towers.

Q. Well, as I understand your definition of Pruneyard, that's a specialty shopping center?

A. Yes, but it takes upon itself the same definition as a regional as far as number of cars, number of dollars—excuse me, number of people available in that trading area.

Q. Do you have any idea how many people shop at the Pruneyard on any given day?

A. No, sir, I don't. I know what their trading area is.

Q. Trading area when you talk about centers, defined as [38] regional and specialties—

A. Yes.

Q. —simply means, does it not, the size of the area in which people would be expected to be in the marketing area; that is, they might drive 50 miles to come to a regional, whereas the neighborhood they might drive very short distance?

A. True. That's true.

MR. O'DONNELL: I have nothing further.

THE COURT: Further questions?

MS. RAVEL: Yes.

#### REDIRECT EXAMINATION

BY MS. RAVEL:

Q. Mr. Lawler, you also made a study of other areas in the San Jose area where people might be likely to congregate?

A. Yes, I did.

Q. Was that a study of the parks in the San Jose area?

A. It included looking at the 18 regional parks within the county. I have a document here.

Q. And what were your conclusions regarding that study?

MR. O'DONNELL: Your Honor, if he has a document there, I have no objection to that going in.

THE COURT: All right. Do you have a report on that?

MS. RAVEL: I have (indicating).

THE COURT: All right, it may be admitted as Plaintiffs' next in order in evidence.

THE CLERK: Plaintiffs' 3 in evidence.

[39] (Whereupon, the above-mentioned document, being a Comparative Statement of Parks and Recreation Department Estimated Park Attendants, was marked Plaintiffs' Exhibit Number 3, and received in evidence.)

MS. RAVEL: Your Honor, I would still like to ask Mr. Lawler what his conclusions were from—resulting from this study.

MR. O'DONNELL: Your Honor, pardon me. I don't understand the question. We have a list with statistics on it and she asked him what his conclusions were.

MS. RAVEL: He's an expert; he has made a study; he can have a conclusion based on the study.

MR. O'DONNELL: I think we'd have to have some foundation. The question to me is unintelligible: "You have a list of numbers, and state what your conclusion is." I really don't even know what general area we're talking about. I can't very well protect the answer.

THE COURT: Well, the question is "What conclusions if any—what opinions if any do you draw from this?"

MS. RAVEL: That's right. I was going to lay a foundation.

MR. O'DONNELL: Well, again I object to that. Their witness has been qualified dealing with shopping in stores. Now I understand we have testimony showing how many people go to parks, and he's going to draw a conclusion from that. He's not been qualified as an expert on that [40] ground.

MS. RAVEL: I would ask him to draw a conclusion based on the number of people that go to parks versus the number of people that he knows go to shopping centers.

THE COURT: What kind of conclusion are you seeking?

MS. RAVEL: Seeking comparisons, whether he can make such comparison.

THE COURT: "Can you compare the numbers?" Is that what you are asking?

MS. RAVEL: Right.

MR. O'DONNELL: If we have numbers in evidence, which I think we do, and we added them all up, and we showed a million people, and here we have a number, and say it shows 500 thousand people, I still don't know if this gentleman—sounds to me almost like a statistical or mathematical comparison which I don't think you need an expert for. I think an expert is to guide the Court, who has some expertise more than a layman. If we're putting one member over another, I don't believe that's proper testimony for an expert. That's not what she wants. I'm sorry, I still don't understand.

THE COURT: Of course, it is outside the scope of redirect, I guess, isn't it?

MR. O'DONNELL: I haven't made that objection. I just don't understand.

THE COURT: All right, objection overruled. You may answer.

[41] You may put a question.

Is there a question before the witness?

MR. O'DONNELL: We have the question; I'm objecting to that question on several grounds, one of which it is not intelligible; second of which is she's calling for a question from a witness who has not been qualified, anything to do with parks.

The third thing is that she's asking the questions for which an expert is not necessary, and this man is no more an expert than I am in comparing two figures.

THE COURT: Well, I guess the question you are getting at is whether from these figures—

MS. RAVEL: He has drawn—

THE COURT: He can draw or has any conclusions.

MS. RAVEL: What was my previous question? That was merely an explanation.

MR. O'DONNELL: This is a conclusion, anything to do with his field of expertise, which is where people are shopping today and what does a park have to do with where people are shopping today?

THE COURT: I understand that objection.

MS. RAVEL: I believe Your Honor has already ruled on that question, and furthermore, it is an issue.

THE COURT: Well, why don't you put your question. Re-state the question, then we will be sure we understand where we are.

[42] Q. (By Ms. Ravel) Mr. Lawler, based on the study which you made of parks in the Greater San Jose Area, and on the study that you made regarding the marketing areas in San Jose, have you made any conclusions?

A. Yes, ma'am, I have.

MR. O'DONNELL: Now, Your Honor, are you going to allow that?

THE COURT: Well, now, she withdrew her last question.

MR. O'DONNELL: Could I hear the question?

THE COURT: You want it read?

MR. O'DONNELL: Yes.

THE COURT: All right, you may read it back.

(The question was read by the Reporter.)



MR. O'DONNELL: Your Honor, I would like the previous objection, plus the lack of foundation. I still think everyone is totally unprepared to know what she's even driving at.

THE COURT: Well, objection overruled, and the question may be answered yes or no.

A. Yes, I have.

Q. (By Ms. Ravel) And what are those conclusions?

MR. O'DONNELL: Same objection.

THE COURT: Objection overruled. You may answer.

A. A look at the composite figures for the years 1974-75 for the 18 regional parks, when broken down by month and [43] divided by the 18 regional parks, shows a total of 35,705 people per location per park per year, and a look at the same period 1975 of the 15 largest shopping centers shows that 685,000 people have attended, specifically Pruneyard 181,000 in that same period of time, so my conclusion is that the people again go where their wants and needs are satisfied, spend significant amounts of time and perform the greater share of their activities in areas.

MS. RAVEL: Thank you. I have nothing further.

THE COURT: Any further questions?

MR. O'DONNELL: Yes.

#### RE-CROSS EXAMINATION

BY MR. O'DONNELL:

Q. Does this study indicate how long the average time is spent at these parks?

A. No, it does not.

Q. Does it indicate how long the average time is spent at the Pruneyard?

A. No, it does not, but we have information on that regarding special shopping.

Q. My question was specifically—

A. Okay.

Q. You relied on information in preparing your report, I assume, such as the 1974-75 shopping center guide put out by the San Jose Mercury News?

A. Yes.

Q. You also, I assume, relied on information such as the Statistical Summary of the San Jose Metropolitan Area '75 (indicating)?

[44] A. Yes. Is that the county or the city?

Q. This is the one put out by San Jose Chamber of Commerce, just the Bay Area comparisons, college enrollments, that type of thing (handing document to the witness).

A. This is not my document?

Q. No. I'm not suggesting that is your document, sir; I'm saying you have relied on the same type—

A. Same type of information; right.

Q. Did you attempt to discover what the volume of passengers going through the San Jose Airport in any given year is?

A. No. I examined the question and did not for a specific reason.

Q. You did not then attempt to find out how many people went through the San Jose Airport in a given year?

A. I examined the question. Should I or should I not, and did not for a specific reason.

Q. And what about the colleges? Did you attempt to determine how many people are located at your local colleges within Santa Clara County?

A. I have a fair idea. I did not do it for purposes of this study.

Q. Did you attempt to determine of the numbers you have given us of people going to the Pruneyard in a given 30-day period, how many of those people were repeats?

A. None of the figures I gave you here were repeats. The figures I gave you were just for one or more times.

[45] Q. That's what I mean.

A. In the last 30 days—oh, pardon me. My mistake. Some of these could have been repeats.

Q. How many could be repeats?

A. One or more times, it doesn't say, because the further analysis was two or more times, three or more times, four or more times, so I just take this to be one or more.

Q. Is the same true of your study with the parks?

A. Most certainly. There are many people who, as you know, talking to head rangers, recognize the same families go back every Sunday.

Q. I take it there are some same people who go back to the Pruneyard time after time, too?

A. There could be.

MR. O'DONNELL: I have nothing further.

#### REDIRECT EXAMINATION

BY MS. RAVEL:

Q. Mr. Lawler, what was your reason for not attempting to determine figures for attendance at San Jose Airport?

A. Yes, like yourselves having traveled airlines quite a bit, when I go to the airport I'm in and out fast, and people don't congregate there for quest mode; they're there to get in and out. Their minds are on other things. They're going; they have bags in their hands, and they're always late.

MS. RAVEL: Thank you.

#### [46] RECROSS EXAMINATION

BY MR. O'DONNELL:

Q. This quest mode, what does that mean?

A. Yes. I used that term maybe rather loosely, but it's people who aren't in a frame of mind to be looking at a

shopping center. They're certainly looking; they're questing.

Q. "Questing" means looking?

A. Yes. Looking, searching, you know, that doesn't hold true for football games, either.

Q. And I take it you are an expert of when people are most disposed to sign petitions?

A. No, sir. I have no comment on that.

Q. How much experience have you had in attempting to get signatures on a petition?

A. I have never engaged in getting names on petitions. I have been very busy in over 20 years locally in San Jose March of Dimes and United Fund, and building a YMCA, and all of that, so I have been very involved in community activity and have had good support in every direction.

• • • • •

[49] THE COURT: All right it is stipulated that there was a refusal to permit with reasonable or other regulation that it was a total refusal of any right to petition or distribute.

MR. HAMMER: Yes, that plaintiffs offered to subject themselves to any sort of regulations that the [50] Pruneyard may want to impose as far as time or manner.

THE COURT: And it was refused.

MR. O'DONNELL: With the exception we always told them they could sit on the parameter, the sidewalk, public sidewalk.

THE COURT: That is within the Pruneyard?

MR. O'DONNELL: We said they absolutely could not get inside the Pruneyard.

THE COURT: All right, so stipulated.

• • • • •

[52] **Kevin Monroe Salmon.**

called as a witness on behalf of the Defendants, being first duly sworn, was examined and testified as follows:

**THE CLERK:** State your full name and spell your last name, please.

**THE WITNESS:** Kevin Monroe Salmon, S-a-l-m-o-n.

**DIRECT EXAMINATION**

**BY MR. O'DONNELL:**

**Q.** And your address?

**A.** 1742 Fabian Drive, San Jose.

**Q.** And Mr. Salmon, you are the manager of the Pruneyard Shopping Center?

**A.** Manager of operations, yes.

**Q.** I believe you submitted a declaration in this matter in which you describe the physical layout of the Pruneyard; could you describe for us the location of the sidewalks with relation to the Center?

**THE COURT:** You are talking about public sidewalks as opposed to sidewalk areas that are under cover within the Pruneyard?

**MR. O'DONNELL:** Yes, we would refer to those as mall areas, and I'm referring to the—

**THE COURT:** Where are the public sidewalks?

**THE WITNESS:** Public sidewalks on the Pruneyard Shopping Center are on Bascom and Campbell areas, those two sides.

[53] **THE COURT:** Yes, the Court is familiar with those. I thought perhaps there were sidewalks elsewhere.

**MR. O'DONNELL:** No, there's just a—

**THE COURT:** Public sidewalks going along the front and down the side of the street where the stop light is?

**MR. O'DONNELL:** Yes, and there are curb cuts for ingress and egress located around the perimeter of the Center, keeping in mind the Center backs up to the freeway, so no entrance there, and on one side is adjoining private property, so we have an L-shaped access to public streets.

**Q.** (By Mr. O'Donnell) Now, referring to that L-shape, there are curb cuts allowing ingress and egress, are there not?

**A.** Curb cuts being driveways, yes.

**Q.** Yes, and adjoining those curb cuts and in fact going across the driveways there are public sidewalks, are there not?

**A.** Yes.

**Q.** And on the—in the Pruneyard, do you have your own security force?

**A.** Yes, we do. We contract a security force.

**Q.** And this security force is in no way related to the Campbell Police Department?

**A.** They are not. Independent.

**MR. O'DONNELL:** Nothing further.

**THE COURT:** Any questions?

**MS. RAVEL:** Yes.

[54] **CROSS-EXAMINATION**

**BY MS. RAVEL:**

**Q.** Mr. Salmon, do most people approach the Pruneyard Shopping Center on foot or by automobile?

**A.** By automobile.

**THE COURT:** Excuse me a moment.

(Interruption.)



Q. (By Ms. Ravel) Would you say there is a large or a small amount of foot traffic on the sidewalks surrounding the shopping center?

A. I would say a small amount.

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**A COMPARATIVE STUDY OF POPULATION GROWTH  
CHARACTERISTICS, VERSUS SPENDING PATTERNS FOR  
METROPOLITAN SAN JOSE FOR THE YEARS 1950-1975**

**CLIFFORD O. LAWLER  
San Jose, California  
May 30, 1976**

### Abstract

This study of growth characteristics and spending patterns for Metropolitan San Jose for the years 1950-1975 shows dramatic increases in both categories.

The ever-growing and ever-widening circle of population dispersion from the "hub of San Jose" shows that the overwhelming majority of people live outside the San Jose Central District.

The analysis provided in this report also shows the population spends the largest portion of their incomes outside the central district. The availability of *goods and services* in any comparison shows the largest share of people are thus likely to spend the most significant amount of their time in the suburban areas *where their wants and needs are satisfied*.

The shopping center complexes provide the location, the opportunity, the availability of goods and services, and thus the satisfaction of consumer wants and needs.

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### INTRODUCTION

This study in social research was performed to survey the demographic aspects of the Standard Metropolitan Statistical Area, SMSA, known as Metropolitan San Jose. This SMSA, by the U. S. Bureau of Census definition, encompasses the Santa Clara County.<sup>1</sup>

The following aspects were of particular interest:

- 1.) Growth characteristics of Metropolitan San Jose over time.
- 2.) Where people live.
- 3.) Where people spend their money.
- 4.) Where people spend a significant portion of their time.
- 5.) How much people spend (\$) in a variety of areas within Metropolitan San Jose.

### METHODOLOGY

The form of research design known as Descriptive Research using the case study approach is applied in this report.

A variety of sources were investigated and researched to answer the questions of particular interest posed in the introduction. Some of the source information is included in the Appendix to this report.

The information includes data from the following sources:

- 1.) U. S. Bureau of Census
- 2.) Santa Clara County Planning Department
- 3.) San Jose City Advanced Planning Department
- 4.) The San Jose Mercury and News Marketing Department

<sup>1</sup> see Definition of Terms, Appendix A-1.

- 5.) California, State Board of Equalization
- 6.) BASIC MARKETING: Concepts, Decisions & Strategy, *Cundiff & Still*, Second Edition, Prentice-Hall, (1971).
- 7.) Residential Permit Survey, City of San Jose, 1970-1974 (July 1975)

*Note:* The writer of this report will be pleased to furnish any information referred to, but not appearing in this report.

Various groups of data and statistics were gathered. An analysis was made to verify that a correlation did exist among the various sources, and among the various groups of data. Where any non-correlation exists, it will be noted in the body of this report.

The analysis which follows covers, mainly, summarized statistics from the grouped data. Annotation is supplied to referenced material. Appendix A—Definition of Terms.—is provided for a quick reference of some terms which may not be in every day usage by some who may read this report.

Conclusions are drawn at the end of each major section of this report.

### LIMITATIONS OF THE STUDY

Time is always the enemy of providing completely adequate work, especially when one can become immersed in gathering and analyzing in detail interesting data. The tendency is to get lost in detail and lose perspective. However with the availability of current source information, such as appears in this report, it is hoped the particular questions pertaining to this study have been answered.

Some assumptions have been made to relate data to each other. As for example, some data is compiled and made



available only every five years, while other data is available on a yearly basis. The comparisons have been cross-checked to, in the writer's opinion, a satisfactory confidence level. Examples of each kind of this data are included in the appendix.

Much larger issues and questions may be raised by other investigations and research of data available in this report. However, an attempt is made to relate to only the basic areas of particular interest. Every effort was made to make the information herein contained as complete, current and dependable as possible.

## SECTION I

### Comparisons of Growth Characteristics in Metropolitan San Jose and Where People Live.

As one of the nations fastest growing metropolitan areas, the SMSA known as Metropolitan San Jose (Santa Clara County) has undergone dramatic changes during the past twenty-five years.

During the years 1950-1975, the population shows a four-fold increase, from 291,000 to 1,169,006 persons. Over 71 percent of the increase occurred by immigration, while the remaining approximately 29 percent occurred by natural increase (marriages, births of the indigenous population), see Appendix B-1, 2, 3, 4.

In fact, by 1973 Santa Clara County surpassed the population of each of 16 states in the U. S. (see Appendix B-5).

An examination of the influx of persons shows they have been settling in an ever-growing, ever-widening circle from what was known in prior years as the "hub of San Jose"; the central core, the downtown area. The 19 planning areas of the North County account for 97% of the population (see Appendix B-3).

The question now arises; "*Where* have people been settling over the years in the ever-growing, ever-widening circle?" Let us examine some of the statistics.

### *Planning Areas—San Jose, and Santa Clara County.*

Mr. John Berg, Planner, San Jose Advanced Planning Department, and Mr. Tanner, Planner, Santa Clara County Planning Department, both define a planning area as "an arbitrary area following geographical boundaries (ie; creeks, major roads, or, natural lines of demarcation)".

### *Census Tract—San Jose, and Santa Clara County.*

The above two named planners also agree that, over time, the definition of a Census Tract has held to be "a contiguous area in which from 2500 to 8,000 persons reside."

During a national census (every 10 years) *Census Tracts* may be realigned as populations grow or decline, while *Planning Areas*, generally, stay constant.

To keep data consistent, the figures in the chart "Population and Housing, April, 1960" (see Appendix B-7, 8, 9, 10) can be equated with selected data from PROFILE 70, Social Planning Council, City of San Jose. The 1960 figures on chart B-7 have been broken off at Census Tract A020 to agree with the realigned 1970 census tract data which changed designation of planning area and census tract areas. The realignment appears in PROFILE 70 noted above.

Note: The above change can be seen by reference to the 1970 census tract map (see Appendix B-11).

The purpose of the above discussion is to keep various groups of data consistent for the following comparison:

Planning Area	1960	1970	% Change
San Jose-Central	86,266	82,226	- 4.7
A. Willow Glen	65,794	77,476	+ 18
So. San Jose	17,467	30,280	+ 73
B. Evergreen	15,688	50,851	+ 223
C. Alum Rock	36,379	51,114	+ 40
D. Berryessa	3,135	11,561	+ 268
E. Milpitas	6,968	34,580	+ 396
F. Alviso	5,190	6,506	+ 25
G. Agnew	15,159	18,822	+ 24
H. Santa Clara	65,884	83,266	+ 26
I. Campbell	41,891	89,107	+ 113
J. Los Gatos	27,628	47,955	+ 74
K. Saratoga	15,329	27,501	+ 79
L. Cupertino/Monte Vista	43,028	92,333	+ 115
M. Sunnyvale	41,073	70,024	+ 70
N. Mt. View/Los Altos	56,704	77,174	+ 36
O. Palo Alto	61,446	67,875	+ 10
P. Los Altos Hills	6,993	11,374	+ 63
Q. Lexington	2,763	2,829	+ 02
R. Almaden	2,734	21,349	+ 681
S. Edenvale	2,233	44,299	+ 1,883
<b>TOTAL—North County</b>	<b>619,752</b>	<b>1,034,190</b>	<b>+ 67%</b>

Note 1: + .5 per cent has been rounded up.

- .5 per cent has been dropped.

Note 2: Inaccuracies in tract figures tend to cancel each other out when aggregated to larger areas.

In an up-date comparison for Santa Clara County, for the years 1950-1970, the Santa Clara County Planning

Department provided the following data from U. S. Census of Population and Housing:

	<i>Total Population</i>			
	1950	1960	1966	1970
Total County	290,547	642,315	919,653	1,065,313

	<i>Percentage Change—Total Population</i>			
	1950 1960	1960 1970	1960 1966	1966 1970
Total County	121.1	65.9	43.2	15.8

	<i>Total Dwelling Units</i>			
	1950	1960	1966	1970
Total County	91,670	199,922	288,462	336,873

One other analysis may be made before conclusions are drawn for this section. In a comparison of distribution of residential buildings authorized in the City of San Jose Statistical Areas for the five year period 1970-1974, the central statistical area contributed only between a low of 3.8% to a possible high of 13.7% in any of those years (see Appendix B-12, 13, 14, 15, 16, 17).

#### Conclusions—Section I

In a summing up of Section I, the following reasonable conclusions can be drawn:

- 1.) The Metropolitan San Jose (SMSA) has shown a dramatic increase.
- 2.) As the area has grown, it is the outlying space from the San Jose Central District which has made the most significant increases. These increases appear in city suburban areas, and in county planning areas.

- 3.) The San Jose Central District showed a decline in population of 4.7% from 1960-1970, while the total SMSA showed a 67% increase.
- 4.) The San Jose Central District contributed the smallest share (in percent) to residential building for the years 1960-1970.
- 5.) Therefore, it is reasonable to conclude that the greatest percentage of people live outside the San Jose Central District trading area, and it is also reasonable to conclude that they perform the greater share of their activities outside the central district.

## SECTION II

### Spending Patterns—Metropolitan San Jose (SMSA)

The prior section has shown the growth of the San Jose Metropolitan Area. It has also shown that the greatest percentage of people live outside the Central San Jose District trading area. Trading area is synonymous in this report with spending area.

This section will show where people spend their money, and coincidentally, where they spend a significant share of their time.

The major source of information used in this section is the Shopping Center Guide for Metropolitan San Jose (SMSA), published by the San Jose Mercury and News Marketing Department (1974-1975 edition), a copy of which is available.

The SMSA market profile shows the following demographics:

There were approximately 368,000 households<sup>2</sup> in Santa Clara County in 1973. Effective buying income<sup>3</sup> per house-

<sup>2</sup> see Appendix A—Definition of Terms.

<sup>3</sup> see Appendix A—Definition of Terms.

hold was \$15,948. This generates a total of \$5.868 billion that was available to spend in the various trading areas/spending areas of Metropolitan San Jose.

Total retail sales in 1973 were \$3.113 billion. This figure represents 53% of the effective buying income of the available households.

The \$3.113 billion in retail sales was spent in the total retail establishments in Metropolitan San Jose (SMSA). The SMSA map in Appendix C-1 shows the location of shopping center complexes. The shopping centers are comprised of Regional, Specialty, Community, and Neighborhood complexes. Definitions of these appear in Appendix A-4, 5, 6, 7, under Definition of Terms.

Not appearing on the map, but located within the same SMSA are, of course, many other large and small single functioning retail establishments.

By comparing this map (Appendix C-1) with the 1970 Census Tract map for the same area (Appendix B-11), it can be seen that the major shopping complexes have been placed *where people live*. The shopping centers supply what appears to be the greatest share of *goods and services* that households require to maintain their particular standard of living.

Catagories noted for the types of goods and services include the following:

#### Goods

1. Automotive
2. Apparel
3. Appliances
4. Department stores
5. Food (supermarkets, gourmet, bakery)
6. Gifts
7. Jewelry
8. Music



9. Restaurants
10. Sporting goods
11. Toys
12. Variety Stores

#### Services

1. Banks
2. Barbers, Beauty Shops
3. Entertainment (theatres, arenas)
4. Savings and Loan
5. Finance and Investments
6. Photography
7. Travel

Note: This list is not inclusive.

The 1974-1975 Shopping Center Guide (accompanied by the map in Appendix C-1 shows 126 shopping centers offering the above goods and services. A summation of the 1973 retail sales for the top 45 shopping centers (including Regional, Specialty and Community) were \$544,257,000.

None of the top 45 shopping centers (or in fact, any of the 126 centers listed) appear in what is known as the San Jose Central Business District (trading area).

The Central Business District is shown as the red cross-hatched area on the map (see Appendix C-1). The definition was supplied by the San Jose Mercury and News. Sales for this area, I am told, are not being kept current because of its deteriorating condition. However, the last available retail sales figures (1972) for this district was \$86,831,000. This figure represents but 4.67% of the total retail sales of \$1,857,659,000 for same year (1972).

The above figures are consistent with what appeared in Section I of this report on *where people live* in Metropolitan San Jose. The conclusion there was that the San Jose Central District experienced no growth in the years 1960-1970.

In other words, a very small portion of people live in the central district, and a very small portion of the total effective buying income is spent there, when compared to Metropolitan San Jose as a whole.

A latest survey for the San Jose Mercury and News by Beldon Associates (dated October 1974-July 1975) showed that in a 30 day period, adults making one or more shopping trips to the 15 largest shopping centers in the Metropolitan San Jose SMSA totaled 685,000 out of 788,000 adults living within the area. (see Appendix C-3) = 86.9%. Taxable retail sales of these selected shopping centers for 1974 totaled \$455,112,996 or an average of \$37,926,083 per month.

When divided by the 685,000 adult shoppers, this shows an average of \$55.36 spent per shopping trip; not an insignificant amount.

A further analysis was made of selected goods and services (not including the normal convenience and shopping goods) of the 126 shopping centers to see what is available. The following summary is provided:

total shopping units selected	food & drug	restaurants	fin. inst. (banks, S/L)	theatres
3024	338	234	130	24

To make an equal comparison, the writer of this report spent several hours driving *every* street of the defined areas of the San Jose Central Business District shown on the map (see Appendix C-1).

A summary tally, as sighted, appears here.

total shopping units	food & drug	restaurants	fin. inst. (banks, S/L)	theatres
1600	26	32	24	5

The above analysis was made to ascertain at least what is available for persons to visit, congregate, and to spend significant portions of their time. It appears clearly to the writer of this report that the suburban shopping center complexes provide this availability.

### Conclusions—Section II

In a summing up of Section II, the following reasonable conclusions can be drawn:

- 1.) A phenomena of the rapid growth of major shopping centers both in terms of dollars and in percent of sales (see Appendix C-2), shows that the entrepreneurs of Metropolitan San Jose are dedicated in some measure to the newer marketing concept, to wit; "we are in business to serve a market, we are not in business to sell a product." (ie; a consumer orientation).
- 2.) It is the writer's belief that business men have found that people (spending units) are willing to shop, and to spend a significant amount of their time in shopping centers (trading areas) *where they live*, providing that their wants and needs can be satisfied.
- 3.) The analysis provided in this report shows the overwhelming percentages of people in Metropolitan San Jose live outside the central district. It also shows they spend the largest portion of their incomes outside the central district. The availability of goods and services in any comparison shows the largest share of people are thus likely to spend the most significant amount of their time in the suburban areas *where their wants and needs are satisfied*.
- 4.) The shopping center complexes provide the location, the availability of goods and services, and thus the satisfaction of consumer wants and needs.

### Appendix A—Definition of Terms

- 1.) *SMSA*—A Standard Metropolitan Statistical Area is a county or group of contiguous counties which contains at least one city of 50,000 inhabitants or more, or "twin cities" with a combined population of at least 50,000. The population living in SMSA's is designated as the metropolitan population. This population is subdivided as "inside central city or cities" and "outside central city or cities."

*Source:* Bureau of the Budget publication, Standard Metropolitan Statistical Areas: 1967, U. S. Government Printing Office, Washington, D. C. 20402.

- 2.) *Household*—The U. S. Bureau of Census defines a household as consisting of "all persons who occupy a housing unit."

*Source:* Bureau of the Census, Current Populations Reports, Series P-20, No. 166, August 24, 1967.

- 3.) *Effective Buying Income*—This term is used as synonymous with Disposable Personal Income. Purchasing power is essential for the conversion of consumer wants and desires into market demand, and income is the chief source of purchasing power for most people. Total Disposable Income is "what people have left over, to spend or save after paying their taxes."

*Source:* BASIC MARKETING: Concepts, Decisions & Strategy, Cundiff & Still, Second Edition, Prentice-Hall, (1971).

- 4.) *Regional Shopping Center*—Provides goods and services in full depth and variety, usually with at least one major department store as the principal tenant and one or two supermarkets; gross area exceeds 400,000 square feet, with parking facilities provided for 1,000 or more automobiles; serves a primary trading area ranging from 300,000 to 1,000,000 people. Regional

Centers are usually set up serve upwards of 100,000 people living within a radius of five or more miles. Such centers closely resemble downtown shopping districts.

- 5.) *Specialty Shopping Center*—A shopping center with no leading tenant but with a large number of retail specialty stores (50 or more). This type of center requires a trade area as broad as that of a regional shopping center. It may or may not have a supermarket as a tenant.
- 6.) *Community Shopping Center*—Provides a wide variety of goods and services in both hard and soft lines, in addition to convenience goods and services. The principal tenant will usually be a junior department or large variety store. The gross area usually ranges from 100,000 to 300,000 square feet with parking facilities provided for at least 400 automobiles; serves a trading area population ranging from 100,000 to 300,000 people.
- 7.) *Neighborhood Shopping Center*—Provides goods and services in limited depth and variety to satisfy daily living requirements. The principal tenant is a supermarket; the gross area ranges from 30,000 to 100,000 square feet, with parking facilities provided for 50 to 400 automobiles; serves a trading area population ranging from 5,000 to 40,000.

*Source:* Shopping Center Guide for Metropolitan San Jose (SMSA), published by the San Jose Mercury and news Marketing Department (1974-1975 edition).

*Also:* Urban Land Institute, Technical Bulletin No. 30, Washington, D. C., May 1957.

### Appendix C-3

#### SHOPPING CENTER SHOPPERS

*Adults Shopping One or More Times in The Last 30 Days*

Shopping Centers	Number			Percent		
	1973	1974	1975	1973	1974	1975
Eastridge	324,000	328,000	300,000	45%	43%	38%
Valley Fair	245,000	281,000	241,000	34	37	31
Westgate	202,000	214,000	190,000	28	28	24
The Prune Yard	• •	190,000	181,000	• •	25	23
Mayfield Mall	134,000	161,000	153,000	19	21	19
Town & Country Village—San Jose	• •	169,000	143,000	• •	22	18
San Antonio	113,000	136,000	132,000	16	18	17
Almaden Fashion Plaza	132,000	128,000	126,000	18	17	16
Stevens Creek Plaza	106,000	130,000	116,000	15	17	15
Stanford	116,000	120,000	111,000	16	16	14



Oakridge Mall	••	94,000	88,000	••	12	11	
Town & Country Village—Palo Alto	••	66,000	68,000	••	9	9	
Town & Country Village—Sunnyvale	••	60,000	73,000	••	8	9	
Sunnyvale Plaza	54,000	59,000	51,000*	8	8	6*	66
Capitol Square	46,000*	46,000*	48,000*	6*	6*	6*	
Total Shoppers	621,000	729,000	685,000	86	96	87	
Total Adults in Santa Clara County	720,000	760,000	788,000				
				Note:			
				685,000			
				= 86.9%			
				788,000			

IN THE  
SUPREME COURT OF THE STATE OF CALIFORNIA

S.F. No. 23812

MICHAEL ROBINS ET AL., *Paintiffs and Appellants,**vs.*PRUNEYARD SHOPPING CENTER ET AL.,  
*Defendants and Respondents.*

Appeal  
County Santa Clara  
Superior Court No. 349363

**JUDGEMENT**

*The above-entitled cause having been heretofore fully argued, and submitted, It Is ORDERED, ADJUDGED, AND DECREED by the Court that the Judgment of the Superior Court of the County of Santa Clara in the above-entitled cause, rejecting Appellants' request that Pruneyard be enjoined from denying access to circulate the petition is reversed. Appellants shall recover their costs on appeal.*

*I, G. E. BISHEL, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the 30th day of March, 1979.*

*WITNESS my hand and the seal of the Court, this 24th day of May, 1979.*

G. E. BISHEL  
Clerk

By: /s/ G. E. SCHNEIDER  
G. E. Schneider  
Deputy

SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK

WASHINGTON, D. C. 20543

November 13, 1979

William C. Kelly, Jr., Esq.  
Latham, Watkins & Hills  
1333 New Hampshire Avenue  
Washington, DC 20036

RE: PruneYard Shopping Center and Fred Sahadi  
v. Michael Robins, et al.  
No. 79-289

Dear Mr. Kelly:

The Court today entered the following order in the above-entitled case:

Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. Mr. Justice Marshall took no part in the consideration or decision of this appeal.

Very truly yours,

/s/ MICHAEL RODAK, JR.  
Michael Rodak, Jr., Clerk

Supreme Court of the United States  
FILED

AUG 21 1979

MICHAEL ROBINS, JR., CLERK

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1978

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No. **79-289**

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PRUNEYARD SHOPPING CENTER, ET AL., *Appellants*,

v.

MICHAEL ROBINS, ET AL., *Appellees*.

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**On Appeal From the Supreme Court  
of the State of California**

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**BRIEF OF THE INTERNATIONAL COUNCIL OF  
SHOPPING CENTERS AS AMICUS CURIAE IN  
SUPPORT OF THE JURISDICTIONAL STATEMENT**

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JOHN R. REILLY  
DEAN L. OVERMAN  
EDWARD C. MAEDER  
PETER N. KYROS, JR.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1978

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No.

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PRUNYARD SHOPPING CENTER, ET AL., *Appellants*,

v.

MICHAEL ROBINS, ET AL., *Appellees*.

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On Appeal From the Supreme Court  
of the State of California

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**BRIEF OF THE INTERNATIONAL COUNCIL OF  
SHOPPING CENTERS AS AMICUS CURIAE IN  
SUPPORT OF THE JURISDICTIONAL STATEMENT**

---

**CONSTITUTIONAL PROVISIONS INVOLVED**

**First Amendment, United States Constitution**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

**Fifth Amendment, United States Constitution**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**Fourteenth Amendment, United States Constitution**

SECTION. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

\* \* \* \*

**Article I, Section 2, Constitution of the State of California**

Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

**INTEREST OF THE AMICUS CURIAE**

The International Council of Shopping Centers ("ICSC") is the trade association of the shopping cen-

ter industry. Members of ICSC, consisting of shopping center developers, owners, operators, tenants, lenders and related enterprises engage in the day-to-day activity of designing, planning, financing, developing, owning and managing shopping centers and their retail stores. The ICSC's 7,400 members represent a majority of the shopping centers in the United States.

These members have a clear interest in the disposition of the present case, since the holding in the court below directly challenges the controlling decision of this Court in *Lloyd v. Tanner*, 407 U.S. 551 (1972), on which ICSC members have relied in establishing fair and proper business policies for shopping centers.

Because the decision of the court below in the present case affects the daily management and legal rights of every shopping center in the United States, the ICSC requests that the Court recognize the importance of this case to the business operations of the shopping center industry.

To bring to the Court's attention the views and arguments of the shopping center industry, the ICSC respectfully submits this brief in support of the Jurisdictional Statement in the present case.

**THE QUESTIONS ARE SUBSTANTIAL**

Shopping centers throughout the United States have relied upon this Court's decision in *Lloyd v. Tanner* in establishing orderly rules for access to their property by persons wishing to exercise their First Amendment rights in a non-business-related context.



The decision below conflicts directly with *Lloyd*. In reasoning and result, the lower court's decision violates established principles of the supremacy of federal constitutional law. Moreover, a conflict now exists between the decision below and a decision of the Oregon Supreme Court which has followed the holding of *Lloyd*. This conflict creates confusion for shopping center owners with respect to their business practices and their federally-based legal rights.

Because of its direct challenge to this Court's constitutional interpretation of the rights of shopping center owners, and, because of its implications for the business practices of all shopping centers, this case warrants full review by this Court.

**1. The Decision Below Is in Direct Conflict With This Court's Decision in *Lloyd v. Tanner***

In *Lloyd v. Tanner*, 407 U.S. 551 (1972), this Court considered a case which closely parallels the present case and established principles which are in direct conflict with the decision of the court below. In that case, the appellees had attempted to distribute handbills in the enclosed mall area of a shopping center in Portland, Oregon. The shopping center had a strict rule against handbilling, based on the ground that handbilling was likely to annoy customers. The persons distributing the handbills left the center at the request of the security guards and later filed suit seeking declaratory and injunctive relief.

In *Lloyd*, this Court addressed the same issue which the present case raises: the conflict between the exercise of First Amendment rights and the recognition of

Fifth and Fourteenth Amendment property rights of shopping center owners. At the outset, the Court said:

We granted certiorari to consider petitioner's contention that the decision below violates rights of private property protected by the Fifth and Fourteenth Amendments.

407 U.S. at 554.

In its analysis in *Lloyd*, this Court first distinguished its opinions in two previous cases: *Marsh v. Alabama*, 326 U.S. 501 (1942), and *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968) which, as discussed below, are similarly distinguishable from the present case.

In *Marsh*, this Court held that when private interests establish the functional equivalent of a municipality on private property and assume all municipal functions, then the property rights of those private owners must give way to the First Amendment rights of persons who use the "company town."

*Lloyd* distinguished *Marsh* on the grounds that the Lloyd Shopping Center had not become the functional equivalent of a municipality. The same distinction is true for the Pruneyard Shopping Center in the present case.

In *Logan Valley*, members of a union of employees of food stores attempted to picket a supermarket, located in a shopping center, which hired non-union employees and paid less than union wages. On review, this Court held that the union picketers were entitled to exercise their First Amendment rights on the shopping center property since the picketing was directly related to the shopping center's operations.

*Lloyd* distinguished this case on the ground that the handbilling activities at the Lloyd Center were not related to the operation of the shopping center. The same distinction applies to the present case; the petitioning activities of the appellees were also unrelated to the operation of the Pruneyard Shopping Center.

After distinguishing *Marsh* and *Logan Valley*, the Court in *Lloyd* squarely addressed the question of the property rights of the shopping center owners and stated the central issue of the case:

The basic issue in this case is whether respondents in the exercise of asserted First Amendment rights, may distribute handbills on Lloyd's private property contrary to its wishes and contrary to a policy enforced against all handbilling.

407 U.S. at 567.

The Court then balanced the property rights of the shopping center owners with the rights of speech of the persons distributing handbills, specifically holding:

"... the Fifth and Fourteenth Amendment rights of private property owners, as well as the First Amendment rights of all citizens, must be respected and protected. . . . We hold that there has been no such dedication of Lloyd's privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights."

407 U.S. at 570.

This holding is equally applicable to the present case; the Pruneyard Shopping Center was no more dedicated to public use than the Lloyd Center. It was a

privately-owned business property which did not perform municipal functions and which enforced its restrictions on petitioning in an entirely non-discriminatory fashion. In the present case, as in *Lloyd*, other, nearby places were available for the exercise of First Amendment rights; Pruneyard Shopping Center, like the Lloyd Center, was bounded in part by public streets available to all citizens.

The error of the court below in interpreting this Court's decision in *Lloyd* is manifest in its clearly inaccurate descriptions of the *Lloyd* opinion. For example, despite *Lloyd's* thorough analysis of the characteristics of First Amendment rights of free speech and Fifth and Fourteenth Amendment property rights described above, the majority opinion below commented:

The Court in *Lloyd* examined the functions performed by Lloyd's center but did not purport to define the nature or scope of Fifth and Fourteenth Amendment rights of shopping center owners generally.

23 Cal. 3d at 904.

While the Court in *Lloyd* may not have defined the nature or scope of the rights of shopping center owners "generally," its decision was unmistakably based on an examination of the First, Fifth and Fourteenth Amendments. As Justice Richardson correctly observed in his dissent in the court below:

The majority seriously errs in its excessively narrow reading of *Lloyd*, which expressed its fundamental reliance upon the *constitutional private property rights of the owner* throughout the entire opinion.

23 Cal. 3d at 913.

The error of the court below in interpreting *Lloyd* caused it to overrule its proper decision in *Diamond v. Bland*, 11 Cal. 331 (1974) *rev'g* *Diamond v. Bland*, 3 Cal. 3d 653 (1970). In that case, the California Supreme Court correctly recognized the rationale of *Lloyd* and overruled its own first decision in the case shortly after *Lloyd* was decided. In its consideration of *Lloyd*, the California Supreme Court in *Diamond* noted that this Court recognized the federally-based property rights of shopping center owners:

Under the holding of the *Lloyd* case, the due process clause of the United States Constitution protects the property interests of the shopping center owner from infringement.

11 Cal. 3d at 335, n.4.

Having acknowledged that *Lloyd* recognized these property rights, the California Supreme Court rightly followed *Lloyd* by concluding that, under the facts presented, the property rights of shopping center owners outweighed the plaintiff's First Amendment rights:

In balancing the interests of the respondents in exercising their First Amendment rights against the property rights of the owners of the shopping center, the court in *Lloyd* concluded that the latter must prevail. The court stated that, in view of the availability to respondents of other public forums for the distribution and dissemination of their ideas, "it would be an unwarranted infringement of property rights to require them to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist. Under these circumstances, we must conclude that defendants' private property interests outweigh plaintiffs' own interests in exer-

cising First Amendment rights in the manner sought herein.

11 Cal. 3d at 334-35.

In its opinion in the present case, the court below erroneously attempted to rationalize its overruling of *Diamond* by suggesting that, in subsequent cases, this Court had reinterpreted the holding of *Lloyd*. To that effect it mistakenly relied on *Hudgens v. NLRB*, 424 U.S. 507 (1976) and *Eastex, Inc. v. NLRB*, 98 S. Ct. 2505 (1978). The decisions in these cases, however, were controlled by highly specialized provisions of the National Labor Relations Act and do not alter the application of *Lloyd* to the present case. Despite the convoluted attempt of the court below to justify its decision, it cannot avoid the inescapable conclusion that this Court's opinion in *Lloyd* should control the disposition of the present case.

## 2. The Decision Below Violates Basic Principles of the Supremacy of Federal Law

The lower court's decision in this case is based in large part on its finding that the Constitution of the State of California confers on the Appellees rights which go beyond those conferred by the First Amendment of the U.S. Constitution. In reaching this conclusion, the lower court not only overruled its own holding in *Diamond*, but also ignored basic supremacy principles which must be considered when federally and state-conferred rights conflict.

The tenets of supremacy are well established; Article VI, Section 2 of the Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof;



and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

This Court has clearly and repeatedly interpreted this language to mean that when state statutes conflict with this Court's interpretation of the U.S. Constitution, the latter must prevail.

In *Cooper v. Aaron*, 358 U.S. 1 (1958), this Court succinctly described the history and theory of supremacy:

Article VI of the Constitution makes the Constitution the "supreme Law of the Land." In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in the notable case of *Marbury v. Madison*, 1 Cranch 137, 177, that "It is emphatically the province and duty of the judicial department to say what the law is." This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court . . . is the supreme Law of the Land, and Art. VI of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, § 3 "to support this Constitution.

358 U.S. at 18.

When this Court has struck a clear balance between federal constitutional values, a state Court cannot simply bypass that balance and strike one of its own based on state statutes and policy. As this Court observed in *Florida v. Mellon*, 273 U.S. 12 (1926):

Whenever the constitutional powers of the federal government and those of the state come into conflict, the latter must yield.

273 U.S. at 17.

In the present case, the court below ignored these supremacy principles and used an interpretation of the California State Constitution to deny the federally-protected property rights of the owner of the Pruneyard Shopping Center which were clearly enunciated by this Court in *Lloyd*.

Federal property rights cannot depend upon the vagaries of state interpretations of state constitutional law. In denying these property rights, the court below erroneously disregarded the supreme nature of this Court's exposition of the U.S. Constitution.

### **3. The Decision Below Conflicts With Decisions of Another State Court and Confuses Shopping Center Owners**

In *Lenrich Associates v. Heyda*, 504 P.2d 112 (Oregon 1972), the Oregon Supreme Court, applying *Lloyd* to facts very similar to those in the present case, reached a decision which stands squarely opposed to the lower court's decision in the present case. In *Lenrich*, members of a group known as the International Society of Krishna Consciousness attempted to chant, march and sell magazines about their religion in the enclosed mall area of a shopping center in Portland, Oregon. The Oregon court found little difference be-

tween that case and *Lloyd* and held that the shopping center could prohibit the activity.

In its analysis, the Oregon court found that *Lloyd* balanced First Amendment speech rights and Fifth and Fourteenth Amendment property rights:

Throughout Mr. Justice Powell's opinion are recurring statements making it clear that the court was engaged in weighing the First Amendment rights of the respondents against the Fifth and Fourteenth Amendment rights of private property owners.

504 P.2d at 115.

The Oregon court also found that the balancing by this Court of the federal constitutional rights precluded the application of the Oregon Constitution to extend speech protections beyond that provided by federal law.

Thus, *Lenrich* sits in direct conflict with the decision of the court below.

Until the decision of the court below in the present case, shopping center owners relied on the decision in *Lloyd* to establish business policies for the non-business-directed exercise of First Amendment rights.

The conflict between California and Oregon law, and the substantial prospect of conflict in other jurisdictions, has confused shopping center owners, who are now uncertain whether states will impose separate standards in balancing between private property rights and rights of free speech.

# CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

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AUG 23 1979

MICHAEL RODAK, JR., CLERK

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1979

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No. 79-289

---

PRUNEYARD SHOPPING CENTER, *et al.*, Appellants,

v.

MICHAEL ROBINS, *et al.*, Appellees,

---

**BRIEF AMICUS CURIAE IN SUPPORT OF  
APPELLANTS' JURISDICTIONAL STATEMENT ON  
BEHALF OF THE TAUBMAN COMPANY, INC.  
AND CALIFORNIA BUSINESS PROPERTIES  
ASSOCIATION**

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BRIEF AMICUS CURIAE IN SUPPORT OF  
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 ASSOCIATION  
 —

OPINIONS BELOW

The findings of fact, conclusions of law, and judgment of the Superior Court of California are unreported but are reprinted in Appendix A to the Jurisdictional Statement. The opinion of the Court of Appeal of California is also unreported but is reproduced in Appendix B to the Jurisdictional Statement. The opinion of the Supreme Court of California is reported at 23 Cal.3d 899, 592 P.2d 323, 153 Cal.Rptr. 836, and is reproduced in Appendix C to the Jurisdictional Statement. The order denying rehearing is reproduced in Appendix D to the Jurisdictional Statement.

### JURISDICTION

A timely petition for rehearing from the judgment of the Supreme Court of California was denied by that court on 23 May 1979. Appellants' notice of appeal was filed on 30 May 1979. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

It may well be that jurisdiction should rather be invoked under 28 U.S.C. § 1257(3), because what is in issue is the denial of Appellants' rights under the Due Process Clause of the Fourteenth Amendment rather than the constitutionality of the California constitutional provision as interpreted and applied by the California Supreme Court. If so, however, this Court's jurisdiction is unaffected. 28 U.S.C. § 2103 provides:

If an appeal to the Supreme Court is improvidently taken from the decision of the highest court of a State, or of a United States court of appeals, in a case where the proper mode of a review is by petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken . . . .

### QUESTION PRESENTED

May California compel the surrender of Appellants' property for use by strangers—relating to matters totally unconnected with Appellant landlord, its tenants, or the property—in direct conflict with this Court's determination in *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), that not even the First Amendment (which is not invoked here) can justify such "an unwarranted infringement" of Appellant's Fourteenth Amendment "property rights," 407 U.S. at 567?

### UNITED STATES AND CALIFORNIA CONSTITUTIONAL PROVISIONS

The Constitution of the United States, Amendment XIV, § 1 reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Constitution of the State of California, Art. I, § 2 reads:

Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

### INTEREST OF AMICI CURIAE

The Taubman Company, Inc., a Michigan corporation, is one of the largest developers and operators of shopping centers in the United States. It is involved in the operation of a total of eighteen regional retail shopping centers. Those centers are located in the states of California, Connecticut, Illinois, Maryland, Michigan, Nevada, New Jersey, New York and Wisconsin. The centers contain an aggregate of approximately 2,400 individual retail businesses occupying about 21,800,000 square feet of leasable area. The Taubman Company, Inc. has a continuing interest in the cause herein. It is presently connected with two actions in the State of



California involving the issue raised by the instant matter, and participated as *amicus curiae* in support of Appellants before the California Supreme Court.

California Business Properties Association ("CBPA"), a California non-profit corporation, was formed in 1972. Its membership is comprised of several hundred organizations representing commercial property owners, major retailers, developers, builders, financiers, real estate agents and professional service corporations. Members are involved in creating redevelopment projects, public and private buildings, and shopping and industrial centers. CBPA members operate nationwide as well as in California. Thirty-two states are represented among the interests and installations of members. CBPA serves as a clearinghouse for information affecting the rights and duties of members and frequently acts to articulate the view of its members, as determined by its Board of Directors. The diminution of the rights of members in their private property is an issue vitally affecting its membership.

#### LETTERS OF CONSENT

The Appellants and Appellees have consented to the filing of this brief *amicus curiae* and their letters of consent have been filed with the Office of the Clerk of this Court.

#### STATEMENT

The facts in this case and in *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), are as close to being identical as to make no difference. Both cases involve a private shopping center. The Lloyd Center ("Lloyd") covers 50 acres and "is crossed in varying degrees by several other public streets." 407 U.S. at 553. The Pruneyard

Center ("the Center") occupies only 21 acres with no public streets crossing it. Both had adjacent public streets. Lloyd has about "60 commercial tenants" and an auditorium and skating rink. *Ibid.* The Center contains about 65 shops, a cinema, and restaurants. The Lloyd auditorium, but not its other facilities, was made available as a public forum for civic and charitable organizations and "presidential candidates of both parties." *Id.* at 555. The Center has consistently and without exception excluded all uses by political, civic, or charitable organizations or individuals.

Lloyd had a total ban on "distribution of handbills," because such activity "was considered likely to annoy customers, to create litter, potentially to create disorders, and generally to be incompatible with the purpose of the Center and the atmosphere sought to be preserved." *Id.* at 555-56. For the same reasons, the Center banned handbilling and solicitation on its premises.

In *Lloyd*, the respondents distributed handbills "to protest the draft and the Vietnam war." *Id.* at 556. They were "quiet and orderly, and there was no littering." *Ibid.* They were told by a security officer that they were "trespassing" and were requested to leave, that they would be arrested if they did not leave, and that they could continue their efforts on the public sidewalks adjacent to the Center, which they did. *Ibid.* Thereafter, the respondents in *Lloyd* filed suit for a declaratory judgment and an injunction to compel Lloyd to allow the use of its premises for their purposes.

In the instant case, the Appellees set up a table in the central courtyard of the Center, from which they

solicited signatures in support of petitions condemning Syria for preventing Jewish emigration and condemning the United Nations for its resolution on Zionism. As in *Lloyd*, the Center's security personnel informed the Appellees that their conduct was prohibited, requested them to leave, and suggested the possibility of using the public sidewalks adjacent to the Center. The Appellees left, but they did not engage in further activity on the public ways. They, too, however, subsequently brought action to compel the Center to make its premises available for their private uses.

In *Lloyd*, the respondents had rested their claim of right to use the shopping center for their political purposes on the First Amendment. Here, the Appellees—in an attempt to avoid the conclusion reached by this Court in *Lloyd* that a First Amendment claim afforded no basis for compelling Lloyd to surrender its property to a private use inconsistent with its function—rested not on the First Amendment, but on Article I, § 2, of the California Constitution. In both cases, the shopping center defendants relied on their property rights guaranteed by the Due Process Clause of the Fourteenth Amendment. In *Lloyd*, this Court held that the claimed rights of free speech could not justify the taking of the petitioner's property for respondents' private use. Here, reversing the rulings of the trial court and the intermediate appellate court, and overruling an earlier decision of its own, *Diamond v. Bland*, 11 Cal.3d 331, 335 n.4, 521 P.2d 460, 463 n.4 (1974), *cert. den.*, 419 U.S. 885 (1974), the California Supreme Court, divided four to three, held that the rights granted by Article I, § 2 of the California Constitution were superior to the rights presented by the Due Process Clause of the Fourteenth Amendment of

the Constitution of the United States. This appeal followed.

**THE QUESTION PRESENTED IS A SUBSTANTIAL  
QUESTION OF CONSTITUTIONAL LAW**

The decision below is in direct conflict with the decision of this court in *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), with the judgment of the Supreme Court of Oregon in *Lenrich Associates v. Heyda*, 264 Ore. 122, 504 P.2d 112 (1972), and with numerous other decisions of state and federal courts. The issue is one of widespread importance, affecting as it does the conduct of business in almost every municipality and suburb in the United States.

To put the question in perspective, it should be made clear what this case is not about. First, the case is not at all concerned with Appellees' rights under the First Amendment. Even the Supreme Court of California concedes that the question of First Amendment rights of Appellees has been decided against them by this Court's decision in *Lloyd*. Indeed, the First Amendment rights that have been trampled on by the California Supreme Court are those of the Appellants in being compelled to use their property for the expression of political views that are not their own. Thus, as this Court recently decided in *Wooley v. Maynard*, 430 U.S. 705, 714-715 (1977):

We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. . . . A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right

to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind." . . . This is illustrated by the recent case of *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), where we held unconstitutional a Florida statute placing an affirmative duty upon newspapers to publish the replies of political candidates whom they had criticized. . . .

Not the Appellees' but the Appellants' freedom of speech under the First Amendment is undermined by the judgment below.

Nor does this case involve the use of public property by those seeking to advance their personal ideologies, although even public property is not necessarily an appropriate forum for such expressions. See, e.g., *Greer v. Spock*, 424 U.S. 828 (1976); *Adderley v. Florida*, 385 U.S. 39 (1966); *Cox v. Louisiana*, 379 U.S. 559 (1965); *Vietnam Veterans Against the War v. Morton*, 506 F.2d 53 (D.C. Cir. 1974).

There is no question of a "First Amendment forum" involved here. For certainly if a city, in its "proprietary capacity", is free to limit access to its transit system's advertising space so as to exclude political advertising, it must be *a fortiori* true that a nongovernmental body which does not discriminate among, but totally excludes all, such proselytizing is not denying a "First Amendment forum". As this Court ruled in *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974):

No First Amendment forum is here to be found. The city consciously has limited access to its tran-

sit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience. These are reasonable legislative objectives advanced by the city in a proprietary capacity. In these circumstances, there is no First or Fourteenth Amendment violation.

And the question here is not whether employees should have a right to express their views on their employer's premises. If that had been the question, the California Supreme Court would have no jurisdiction to decide it. That issue has been preempted for resolution by the National Labor Relations Board. See, e.g., *Central Hardware Co. v. N.L.R.B.*, 407 U.S. 539 (1972); *Hudgens v. N.L.R.B.*, 424 U.S. 507 (1976); *Eastex v. N.L.R.B.*, 437 U.S. 556 (1978); *Garcia v. Gray*, 507 F.2d 540 (10th Cir. 1974), *cert. den.*, 421 U.S. 971 (1974).

The question presented here is exactly that which was stated by Mr. Justice Powell for the Court in *Lloyd*, 407 U.S. at 501.

This case presents the question reserved by the Court in *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968), as to the right of a privately owned shopping center to prohibit the distribution of handbills on its property when the handbilling is unrelated to the shopping center's operations.

Cf. *Asociacion de Trabajadores, Etc. v. Green Giant Co.*, 518 F.2d 130, 135 (3d Cir. 1975). In *Lloyd*, the Court held that the shopping center did, indeed, have such a "right" of exclusion and that that right derived from the provisions of the Due Process Clause of the Fourteenth Amendment.



Indeed, it was long before *Lloyd* that this Court recognized the constitutional right of a property owner to preclude others from using its property for their own ends, even where the property owner was a public utility. *Delaware, L. & W. R. Co. v. Town of Morristown*, 276 U.S. 182 (1928); cf. *State of New Hampshire v. Linsky*, 379 A.2d 813, 821 (1977). And, as this Court noted in *Rowan v. Post Office Dept.*, 397 U.S. 728, 737 (1970):

The Court has traditionally respected the right of a householder to bar, by order or notice, solicitors, hawkers, and peddlers from his property. See *Martin v. Struthers* [319 U.S. 141, 147 (1943)]; cf. *Hall v. Commonwealth*, 188 Va. 72, 49 S.E. 2d 369, appeal dismissed, 335 U.S. 875 (1948) [apartment house complex].

The Supreme Court of California would have it that *Lloyd* did not decide the right of the property owner to exclude, but only that the would-be infringers on the Center's property had no basis under the First Amendment for asserting rights of free speech. It attempted the ploy that the California Constitution created a right higher even than the First Amendment and thus provided the license to trespass not provided by the First Amendment. It was exactly this position which was rejected by the Supreme Court of Oregon in *Lenrich Associates v. Heyda*, 264 Ore. 122, 129, 504 P.2d 112, 116 (1972):

The issue in this case, as in *Tanner*, is the extent to which plaintiff's rights as a property owner can be infringed in favor of the rights of the public to free speech and freedom of expression. In the absence of any significant factual differences the decision in *Tanner* is controlling and requires that this case be reversed.

The Oregon Court recognized, as it had to, that *Lloyd* expressed not only the absence of the respondents' free speech rights, but also the supervailing property rights of the shopping center under the Due Process Clause of the Fourteenth Amendment. That the *Lloyd* case established the shopping center's Fourteenth Amendment right to exclude the proselytizers and to confine the use to which it would put its own property allows of no question, unless it is to be said that this Court, in the *Lloyd* case, did not mean what it said or did not say what it meant.

That the question was the scope of the property owner's Fourteenth Amendment rights is made clear from the question that was framed by this Court, 407 U.S. at 552: "This case presents the question reserved by the Court in *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968), as to the right of a privately owned shopping center to prohibit the distribution of handbills on its property when the handbilling is unrelated to the shopping center's operations."

"We granted certiorari," said this Court in *Lloyd*, "to consider petitioner's contention that the decision below violates rights of private property protected by the Fifth and Fourteenth Amendments. 404 U.S. 1037 (1972)." 407 U.S. at 552-553. This Court resolved that question in favor of the property owner's rights:

[I]t must be remembered that the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on *state* action, not on action by the owner of private property used nondiscriminatorily for private purposes only. The Due Process Clauses of the Fifth and Fourteenth Amendments are also relevant to this

case. They provide that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." There is the further proscription in the Fifth Amendment against the taking of "private property . . . for public use, without just compensation."

Although accommodations between the values protected by these three Amendments are sometimes necessary, and the courts properly have shown a special solicitude for the guarantees of the First Amendment, this Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only. [*Id.* at 567-568.]

We do say that the Fifth and Fourteenth Amendment rights of private property owners, as well as the First Amendment rights of all citizens, must be respected and protected. The Framers of the Constitution certainly did not think these fundamental rights of a free society are incompatible with each other. There may be situations where accommodations between them, and the drawing of lines to assure due protection of both, are not easy. But on the facts presented in this case, the answer is clear. [*Id.* at 570.]

The facts of this case, as already noted, are exactly the same as those in *Lloyd*. Thus, the California court's judgment can be permitted to stand only if this Court's ruling in *Lloyd* establishing, or acknowledging, Appellants' Fourteenth Amendment property rights is to be discarded.

It takes a particularly brazen reading of *Lloyd* to suggest that this Court was not there concerned with the due process property rights of the shopping center. It was exactly these Fourteenth Amendment property

rights that justified the Court's conclusion there and which equally requires the reversal of the judgment below.

### CONCLUSION

If the California Supreme Court has the authority to expand rights of freedom of expression vis á vis the State of California beyond those afforded by the First Amendment, it surely does not have the authority to diminish the constitutional rights of the Appellants under the Fourteenth Amendment, as so clearly pronounced by this Court. This Court should assert its jurisdiction over this case and summarily reverse the judgment below on the basis of the *Lloyd* decision.

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# In the Supreme Court

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## United States

OCTOBER TERM, 1978

**No. 79-289**

PRUNEYARD SHOPPING CENTER and FRED SAHADI,  
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vs.

MICHAEL ROBINS, et al.,  
*Appellees.*

**On Appeal From The  
California Supreme Court**

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### BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANTS

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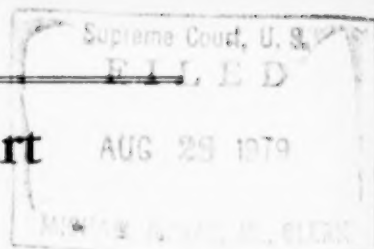
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# In the Supreme Court

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PRUNEYARD SHOPPING CENTER and FRED SAHADI,  
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On Appeal From The  
California Supreme Court

**BRIEF AMICUS CURIAE OF PACIFIC LEGAL  
FOUNDATION IN SUPPORT OF APPELLANTS**

## **INTEREST OF AMICUS**

Pursuant to Supreme Court Rule 42, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of appellants PruneYard Shopping Center, *et al.* Consent to the filing of the brief has been granted by counsel for all parties. Copies of these letters of consent have been lodged with the Clerk of this Court.

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the broad public interest. Policy for PLF is established by an independent Board of Trustees com-



posed of concerned citizens, the majority of whom are attorneys.

Of particular concern to PLF, its members, supporters, and contributors is the conflict between the California Supreme Court's decision in *PruneYard* and the most recent decisions rendered by this Court defining the parameters of First Amendment free speech rights vis-à-vis Fifth and Fourteenth Amendment private property rights.

In both *Lloyd Corporation v. Tanner*, 407 U.S. 551 (1972), and *Hudgens v. National Labor Relations Board*, 424 U.S. 507 (1976), this Court considered the extent to which First Amendment rights attach to private property. In considering this issue, this Court observed that the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on *state* actions, not on action by the owner of private property used nondiscriminatorily and only for private purposes. This Court concluded that First Amendment rights can be exercised on private property *only* when such property assumes all of the characteristics and attributes of a municipality.

The California Supreme Court has chosen to reject this criterion, notwithstanding federally guaranteed property rights, and has instead adopted its own standard—when private property is opened to the public for commercial purposes, free speech rights attach. The ultimate effect of the California Supreme Court's decision is clear. Under the guise of the state's free speech provisions (Cal. Const. art. I, §§ 2 and 3), it impermissibly attempts to overrule this Court's statements in *Lloyd* and *Hudgens* regarding the

protection of private property, thereby circumventing the protection previously accorded by this Court under the Fifth and Fourteenth Amendments.

The standard adopted by the California Supreme Court has been specifically rejected by this Court. In *Lloyd* the respondents argued that the property of a large shopping center "is open to the public" and "serves the same purposes as a 'business district' of a municipality." It was then asserted that "all members of the public . . . have the same right of free speech as they would have on the similar public facilities in the streets of a city or town." *Lloyd*, 407 U.S. at 569. This Court concluded in response to such argument that it "reaches too far." *Id.* This Court stated "[t]he Constitution by no means requires such an attenuated doctrine of dedication of private property to public use." *Id.*

The ramifications of the Court's opinion in *PruneYard* are ominous. Any time property in a modern shopping center is opened to the public, no matter how limited the invitation, the Court's opinion in *PruneYard* converts its essentially private character to one dedicated to public use. The opinion renders the Fifth and Fourteenth Amendment due process guarantees subservient to article I, sections 2 and 3 of the California Constitution. Such a sweeping repudiation of Fifth and Fourteenth Amendment guarantees has never been sanctioned by this Court. This Court stated in *Lloyd* that while

"courts properly have shown a special solicitude for the guarantees of the First Amendment, this Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property

privately owned and used nondiscriminatorily for private purposes only." *Lloyd*, 407 U.S. at 568.

PLF adopts the position of this Court in *Lloyd* where this Court stated:

"We do say that the Fifth and Fourteenth Amendment rights of private property owners, as well as the First Amendment rights of all citizens, must be respected and protected. The Framers of the Constitution certainly did not think these fundamental rights of a free society are incompatible with each other." *Lloyd*, 407 U.S. at 570.

It is the interests of the property owner who must contend with the imbalance created by the California Supreme Court's decision in *PruneYard* which amicus seeks to represent. PLF agrees that there may be need in certain situations for accommodation between First, Fifth, and Fourteenth Amendment rights and for "the drawing of lines to ensure due protection of both," but the *PruneYard* case does not present that situation. The California Supreme Court unnecessarily places these rights on a collision course.

PLF therefore respectfully submits that notice of probable jurisdiction and review are essential in this case so that there may be established throughout the country a consistent and uniform recognition of the rights of private property owners in relation to the attempted exercise of speech and speech related activities on private property.

#### OPINION BELOW

The opinion of the California Supreme Court is reported at 23 Cal. 3d 899 (1979).

#### QUESTION PRESENTED

Whether the owner of a private shopping center, which is not the equivalent of a municipality and is open to the public solely for the designated purpose of commercial enterprise, is protected under the Fifth and Fourteenth Amendments to the Constitution of the United States from an assertion under the California Constitution of the rights of freedom of speech and petitioning by individuals, when there exists adequate, effective channels of communication other than soliciting on the private property.

#### ARGUMENT

##### I

#### THE PRUNEYARD OPINION VIOLATES PRINCIPLES CAREFULLY EVOLVED BY THIS COURT WHICH INSURE THE COMPATIBILITY OF FREE SPEECH AND PRIVATE PROPERTY RIGHTS

The nonconsensual use of privately owned property by the public as a forum for the exercise of First Amendment rights is an issue that has been the subject of four major United States Supreme Court decisions in the past 33 years. While the first two decisions upheld the right of free speech against attempted assertions of private property rights, the latter two cases were resolved by a recognition that the First Amendment only proscribes *governmental* infringement on free speech and does not prohibit limitations on free speech by owners of private property.

The first of these four cases, *Marsh v. Alabama*, 326 U.S. 501 (1946), involved a company town, which although privately owned, had

"all the characteristics of any other American town. . . . In short, the town and its shopping district are accessible to and freely used by the public . . . and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation." *Id.* at 502-03.

After refusing a request to stop the distribution of religious literature on the sidewalk without a permit, appellant Marsh was arrested and convicted of criminal trespass. On appeal to the United States Supreme Court, appellant contended that her First Amendment rights to freedom of speech and religion had been violated. She argued that the company town was tantamount to a municipality. *Id.* at 506-08. This Court reversed appellant's conviction and extended First Amendment protection to privately owned property which, in essence, had assumed all of the characteristics of a municipality. In extending free speech protection to the private arena, this Court adopted a "sliding scale" to determine when private property became "quasi-public"—

"The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by . . . those who use it." *Id.* at 506.

Thus, the Court expanded First Amendment rights beyond their traditional scope by upholding those rights against attempted constraints not by the state, but instead by private citizens on privately owned property.

Twenty-two years later, this Court decided the case of *Amalgamated Food Employees Union Local 590 v. Logan*

*Valley Plaza*, 391 U.S. 308 (1968), in which the *Marsh* rationale was extended to a privately owned shopping center by upholding the right of a union to picket in the parking lot of a supermarket located in Logan Valley Plaza. The key to the decision was a determination that the shopping center was the functional equivalent of the business district discussed in *Marsh*. This Court focused its attention on the nature of the area picketed, rather than on its ownership. A major consideration was a desire to preserve traditional First Amendment forums from destruction by economic and social changes. The holding in *Logan Valley* was heavily influenced by the facts. The holding was limited to the exercise of First Amendment rights in those situations where the manner and purpose is generally consonant with the actual use of the property and where no alternative means of communication exist. The Court expressly reserved the question of whether *Logan Valley* would extend to speech which is unrelated to the use of the property.

Four years later the Court was faced with this very issue in *Lloyd Corporation v. Tanner*, *supra*. *Lloyd* involved an enclosed shopping center in Portland, Oregon, consisting of 60 stores. The shopping center management adhered to a policy prohibiting the distribution of leaflets and handbills on its property. Anti-war activists who were asked to leave the mall on threat of arrest sought declaratory and injunctive relief to restrain the enforcement of the center's policy. The Court in *Lloyd* preserved the private property rights of a shopping center owner by stating that a privately owned shopping center may prohibit the exercise of First Amendment activity which is unrelated to the operation of the



center. This Court rejected the *Marsh* "sliding scale" test, distinguished *Logan Valley*, and held that *Marsh* was not intended to extend First Amendment rights to private property until it had acquired *all* of the attributes of a municipality.

In a related case, *Central Hardware Co. v. National Labor Relations Board*, 407 U.S. 539 (1972), this Court decided that the parking lots surrounding a single, free-standing store, not located in a mall, need not be made available for the exercise of free speech rights because the lots were not the functional equivalent of public property devoted to public use. The Court stated that to hold otherwise would "constitute an unwarranted infringement of long-settled rights of private property protected by the Fifth and Fourteenth Amendments." *Id.* at 547.

*Hudgens v. National Labor Relations Board*, 424 U.S. 507 (1976), is the latest of the shopping center cases. In this case a store located in an enclosed shopping mall was picketed by off-site warehouse employees. The mall owners threatened the picketers with arrest if they did not leave. The union then filed an unfair labor practice action against the mall owners. Highlighting the inconsistency between *Logan Valley* and *Lloyd*, this Court expressly overruled the former, rejected the concept that a shopping center should be treated as public property for First Amendment purposes, and limited *Marsh* to its specific facts. In returning to more traditional notions of First Amendment rights, this Court observed that free speech is only to be guaranteed against infringement by the *state or federal government*, and it reiterated the holding in *Lloyd* that private property

becomes public for First Amendment purposes *only* when it assumes all of the characteristics of property normally devoted to public use.

The state of the law in the post-*Hudgens* period with respect to the exercise of free speech rights by the public on privately owned property may be summarized as follows:

1. Private property will only be considered as public and therefore a proper forum for the exercise of First Amendment rights if such private property assumes *all* of the characteristics of a municipality. The fact that a shopping center has become the central business district of a community is not enough. An ordinary shopping center is not the equivalent of a town. The *Marsh* "sliding scale" of private, quasi-public, and public property has been rejected.

2. First Amendment rights will continue to be protected against infringement by governmental activity on most, but not all, public property. *E.g.*, *Greer v. Spock*, 424 U.S. 828 (1976) (military reservation not generally open to public for First Amendment purposes); *Adderley v. Florida*, 385 U.S. 39 (1966) (grounds of jailhouse); *Cox v. Louisiana*, 379 U.S. 559 (1965) (courthouse); *Frend v. United States*, 100 F.2d 691 (D.C. Cir.), *cert. denied*, 306 U.S. 640 (1939) (foreign embassy). See *Brown v. Louisiana*, 383 U.S. 131, 157 (1966) (Black, J., dissenting) ("[L]ibraries, schoolhouses, fire departments, courthouses, and executive mansions are maintained to perform certain specific and vital functions. Order and tranquility of a sort entirely unknown to the public streets are essential to their normal operation").

First Amendment activity will not be protected against infringement by private individuals on privately owned property.

The California Supreme Court's decision in *PruneYard* thus violates principles which have been established by this Court insuring the compatibility of First, Fifth, and Fourteenth Amendment rights and must be reversed.

## II

### THE PRUNEYARD OPINION IMPERMISSIBLY CONFLICTS WITH THIS COURT'S DECISIONS IN LLOYD AND HUDGENS

The *Hudgens* case makes it clear that, in an attempted assertion of First Amendment rights on private property, the federally guaranteed rights of the property owner will prevail unless the private property has assumed all the characteristics of a municipality. In *PruneYard*, the appellee has claimed below, and the California Supreme Court has adopted as part of its holding, that the California Constitution grants broader rights of speech and petitioning than does its federal counterpart, thus establishing the basis for the exercise of free speech and petitioning rights on private property. However, what the California Supreme Court has effectively done is to use the state guaranteed right of free expression to defeat a property owner's Fifth Amendment property rights. While it is no doubt true that "states are free to establish greater rights under their constitutions than those guaranteed by the federal Constitution," *PruneYard*, 23 Cal. 3d at 903-04, it is not true that states may use their own constitutional guarantees to defeat other federally guaranteed rights of its citizens.

The California Supreme Court has attempted to relegate Fifth Amendment property rights to a subservient position vis-à-vis the "liberty of speech" provision of the California Constitution, even though this Court in *Hudgens* ruled that the superior free speech guarantee of the First Amendment cannot be used to force a landowner to yield his Fifth Amendment property rights. See *PruneYard*, *supra*, dissenting opinion of Richardson, J., at 911. The California Supreme Court has taken this position despite the fact that it has acknowledged the existence of the Supremacy Clauses contained in both the State and Federal Constitutions, *PruneYard*, 23 Cal. 3d at 903 n.2, and has recognized in an earlier case dealing with essentially the same facts that

"[e]ven were we to hold that the state Constitution in some manner affords broader protection than the First Amendment to the United States Constitution . . . nevertheless supremacy principles would prevent us from employing state constitutional provisions to defeat defendant's federal constitutional rights." *Diamond v. Bland*, 11 Cal. 3d 331, 335 n.4 (1974).

In this instance the state constitutional guarantee of free speech is in conflict with the Fifth Amendment rights of the property owner. When there is a conflict between the Federal and State Constitutions, the Supremacy Clause of the United States Constitution controls. *Reynolds v. Sims*, 377 U.S. 533, 584 (1964); *Whitcomb v. Chavis*, 403 U.S. 124, 180 (1971); *Lucas v. State of Michigan*, 420 F.2d 259, 263 (6th Cir. 1970). Moreover, the courts of the several states are obligated to uphold the federal law. *Stone v. Powell*, 428 U.S. 465, 494 n.35, rehearing denied, 429 U.S.

874 (1976). See Cal. Const. art. III, § 1 (the United States Constitution is the supreme law of the land).

Justice Newman, writing for the majority of the California Supreme Court in *PruneYard*, posed the "main question" as being whether *Lloyd*

"recognize[d] federally protected property rights of such a nature that we are now barred from ruling that the California Constitution creates broader speech rights as to private property than does the federal Constitution . . . . If not, does the California Constitution protect speech and petitioning at shopping centers?" *PruneYard*, 23 Cal. 3d at 903.

In an exercise of legal gymnastics, the Court answered the first question in the negative and the second in the affirmative.

The *PruneYard* Court began its analysis by inquiring whether *Lloyd* identified any special property rights protected by the United States Constitution, and determined that *Lloyd* is primarily a free speech case and does not purport to define federally guaranteed property rights. *PruneYard*, 23 Cal. 3d at 904. However, in *Lloyd*, Justice Powell indicated in the majority opinion:

"We granted certiorari to consider petitioner's contention that the decision below violates rights of private property protected by the Fifth and Fourteenth Amendments." *Lloyd*, 407 U.S. at 552-53.

The discussion of this Court in *Lloyd* centered on the extent to which a property owner must allow his private property to be used for First Amendment purposes. The holding of this Court made it clear that this case was an attempt to determine the scope of private property rights:

"We hold that there has been no such dedication of Lloyd's privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights." *Id.* at 570.

The California Supreme Court for all practical purposes ignored this Court's decision in *Hudgens*, which further refined this area of the law. In the *PruneYard* decision, the Court devoted a total of three sentences to *Hudgens*. Although that case deals in part with First Amendment rights of picketers in a shopping center under the National Labor Relations Act, Justice Stewart preceded that discussion with an examination of First Amendment rights on privately owned shopping centers. He concluded that

"under the present state of the law the constitutional guarantee of free expression has no part to play in a case such as this." *Hudgens*, 424 U.S. at 521.

The California Supreme Court misread both *Lloyd* and *Hudgens*.

Ignoring the "supreme law of the land," the Court then launched into a zoning analysis to justify its position. It then examined how the modern shopping center has assumed the position of the new central business district in many locations. Even assuming this status, the state of the law is such that where the shopping center has assumed the functional equivalency of a central business district it is an insufficient basis upon which to extend First Amendment rights. *Lloyd* and *Hudgens* make it clear that unless a shopping center has assumed *all* of the attributes and characteristics of a state-created municipality,



it need not be opened up to the general public for the exercise of First Amendment rights. See *Curtis v. Rosso & Mastracco, Inc.*, 413 F. Supp. 804, 807 (E.D. Va. 1976); *People v. Bush*, 39 N.Y.2d 529, 534, 384 N.Y.S.2d 733, 735 (N.Y. 1976).

It is therefore clear that the *PruneYard* decision impermissibly conflicts with the Court's decision in *Lloyd* and *Hudgens* and that it must be set aside.

### III

#### THE CALIFORNIA SUPREME COURT'S DECISION IN PRUNEYARD CONFLICTS WITH OTHER FEDERAL AND STATE COURT DECISIONS DEMONSTRATING THE NECESSITY FOR THE NOTING OF PROBABLE JURISDICTION

Decisions by state and federal courts have been consistent in their application of the *Lloyd* and *Hudgens* holdings that privately owned property need not be opened up to the public for the exercise of speech and petitioning. In a 1972 case, the Supreme Court of Oregon invoked the *Lloyd* rationale to uphold the federally guaranteed property rights of a shopping mall owner as against the attempted exercise of speech and speech-related activities by religious organizations in *Lenrich Associates v. Heyda*, 504 P.2d 112 (Or. 1972). The shopping mall in that case was almost identical to *PruneYard* and, as in this case, the defendants in *Lenrich Associates* argued that the state constitution afforded them greater individual rights of expression than those guaranteed by the First Amendment. The Court recognized that although it was

"free to enforce the guarantees of our state constitution so as to allow greater freedom and to give greater

protection to individual liberties than are given under the federal Bill of Rights as interpreted by the United States Supreme Court . . . [t]he issue raised by plaintiff is whether its rights under the Constitution of the U.S. as the owner of private property are outweighed by defendants' First Amendment rights of free speech." *Id.* at 115.

Based upon the controlling authority of *Lloyd*, the Court held that a property owner's Fifth and Fourteenth Amendment property rights cannot be outweighed by a state constitutional provision.

The *Lloyd* case was also used by the Supreme Court of Illinois in 1972 to resolve a controversy involving another attempted assertion of free speech rights in an enclosed, privately owned shopping center. In *People v. Sterling*, 287 N.E.2d 711 (Ill. 1972), the defendants sought to distribute leaflets criticizing a local newspaper's coverage of a "racial situation" in the state. Defendants were arrested after they refused to leave the privately owned mall and were found guilty of criminal trespass. On appeal, the defendants asserted that they were deprived of their federally guaranteed right to free speech, relying on *Logan Valley*. The Court disagreed, holding that *Lloyd* was dispositive of the issue. *Id.* at 714. See also *Homart Development Co. v. Fein*, 293 A.2d 493 (R.I. 1972).

*International Society for Krishna Consciousness, Inc. v. Reber*, 454 F. Supp. 1385 (C.D. Cal. 1978), involved an assertion of First Amendment rights by a religious society on the sidewalk of a privately owned street in an amusement park. The park had a policy against soliciting, distributing

leaflets, or otherwise proselytizing the public. The Court identified the issues as being

“the extent to which speech should be protected under the First Amendment when it takes place on property that appears to be public but actually is privately owned.” *Id.* at 1389.

After reviewing the federal law from *Marsh* to *Hudgens*, the Court observed that although the privately owned street

“is the functional equivalent of a public street[,] [i]t is not, however, the functional equivalent of a municipality such as existed in *Marsh*. Therefore, under the Supreme Court’s holding in *Hudgen* [*sic*], Plaintiffs are not entitled to . . . freely distribute and sell religious literature and solicit donations on private property . . . .” *Reber*, 454 F. Supp. at 1390.

In *Curtis v. Rosso & Mastracco, Inc.*, *supra*, the plaintiff was arrested for trespassing while on the premises of a supermarket to unionize its employees. Plaintiff was acquitted of all charges and thereafter brought a civil rights action against the supermarket for denying him the “right ‘to move about freely and peaceably in public places,’ pursuant to 42 U.S.C. § 1983.” 413 F. Supp. at 805. The Court examined whether there was sufficient state action in order to apply Section 1983 and whether the plaintiff had been denied any constitutional rights.

Turning to the state action issue, the Court reviewed *Marsh* and its progeny and concluded that

“[i]t is evident from the most recent decisions emanating from the Supreme Court that . . . shopping center[s] . . . are not the functional equivalents of a public municipal facility. Therefore, traditional constitutional

protections . . . do not attach to activities conducted in shopping centers.” *Curtis*, 413 F. Supp. at 806-07.

The Court noted that although *Hudgens* involved a labor dispute, it was relied upon for the

“delineation of the applicability of the Constitution and its protection to privately owned facilities which are publicly accessible.” *Id.* at 807 n.1.

In a recent civil rights action, the Seventh Circuit applied the holding of *Marsh*, reaffirmed by *Hudgens*, to a challenge by the Illinois Migrant Council which sought to exercise First Amendment rights on residential property owned by a soup company. *Illinois Migrant Council v. Campbell Soup Company*, 574 F.2d 374 (7th Cir. 1978). The Court observed that because

“the constitutional guarantee of free speech protects only against abridgement by government . . . one must find some sort of state action to establish a violation of First Amendment free speech rights.” *Id.* at 375-76.

The Court then noted the *Marsh* exception that when a privately owned town assumed all the functions and components of a municipality, the state action prerequisite of the First Amendment is satisfied. After reviewing *Logan Valley* and *Lloyd*, the Court observed that in *Hudgens* the Supreme Court

“returned to a strict *Marsh* analysis and held that a shopping center was not the functional equivalent of a town, ergo no violation of freedom of speech.

"It is the *Marsh* doctrine, unscathed by *Logan Valley* and *Lloyd*, and reaffirmed by *Hudgens*, that we now will apply." *Illinois Migrant Council*, 574 F.2d at 376.

In *People v. Bush*, *supra*, union members who picketed on a private sidewalk in front of a supermarket were arrested for trespassing. They asserted a First Amendment right to picket on private property, based on *Logan Valley*. The Court, however, noted that *Logan Valley* was overruled by *Hudgens* and that

"private property rights supercede First Amendment rights in all cases which fall short of the totality of control exhibited in *Marsh* . . . ." *People v. Bush*, 39 N.Y.2d at 533, 384 N.Y.S.2d at 735.

The *PruneYard* decision thus clearly conflicts with the decisions of both state and federal courts in the area of First Amendment rights and the extent to which such rights may be exercised on private property. The noting of probable jurisdiction of this Court is therefore essential.

### CONCLUSION

Justice Richardson, writing for the dissent in the four to three *PruneYard* decision, recognized the "paramount federal constitutional imperative" that private property rights must not be sacrificed in favor of a subservient state policy or goal. *PruneYard*, 23 Cal. 3d at 916 (Richardson, J., dissenting). It is the position of amicus that this is the better reasoned opinion and one which is consistent with the pronouncements of this Court. Moreover, the existence of adequate and effective alternative channels of communication in this case, as concluded by the Superior Court,

render the deprivation of federally guaranteed property rights by the California Supreme Court in the *PruneYard* opinion wholly unnecessary.

For these reasons, this Court should note probable jurisdiction of this appeal and reverse the decision of the California Supreme Court.

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August 1979



AUG 30 1979

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1979

**No. 79-289**

PRUNYARD SHOPPING CENTER and FRED SAHADI,  
*Appellants,*

vs.

MICHAEL ROBINS, *et al.*,  
*Appellees.*

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

**BRIEF AMICI CURIAE ON BEHALF OF  
HOMART DEVELOPMENT CO.  
AND  
SEARS, ROEBUCK AND CO.  
IN SUPPORT OF APPEAL**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1979

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No. 79-289

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PRUNEYARD SHOPPING CENTER and FRED SAHADI,  
*Appellants,*

vs.

MICHAEL ROBINS, *et al.*,  
*Appellees.*

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ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

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**BRIEF AMICI CURIAE ON BEHALF OF  
HOMART DEVELOPMENT CO.**

**AND**

**SEARS, ROEBUCK AND CO.  
IN SUPPORT OF APPEAL**

---

**INTEREST OF THE AMICI CURIAE\***

Homart Development Co. (hereafter "Homart") is the owner and operator of numerous private shopping centers located throughout the United States. Homart has been a party to three prior disputes involving the issue presented by the instant case.<sup>1</sup> Homart has also appeared as an *amicus curiae*

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\* This brief is being filed with the written consent of all parties. Pursuant to Supreme Court Rule 42(1), these consents are being filed simultaneously under separate cover with the Clerk of the Court.

1. In the first of those cases, *Diamond v. Bland*, 3 Cal. 3d 653, 407 P. 2d 733 (1970), *cert. den. sub nom., Homart Development*

(Footnote continued on next page.)

before this Court to argue related questions in *Taggart v. Weinacker's*, 397 U. S. 223 (1970); and *Lloyd Corp. v. Tanner*, 407 U. S. 551 (1972). The decision below, concluding that "the California constitution protect[s] speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned" (Sl. Op., p. 18), thus presents a recurrent question of substantial interest to Homart.

The issue involved in this case is not confined to only soliciting signatures on a petition to the government.<sup>2</sup> Nor is it restricted to shopping centers located in California. Moreover,

(Footnote continued from preceding page.)

*Co. v. Diamond*, 402 U. S. 988 (1971) (the Chief Justice and Mr. Justice Blackmun being of the opinion that certiorari should be granted), *rehg. den.*, 404 U. S. 874 (1971), *jt. pet. reh. den.*, 405 U. S. 981 (1972) (the Chief Justice and Mr. Justice Blackmun being of the opinion that certiorari should be granted), *rehg. den.* 409 U. S. 897 (1972) (hereafter "*Diamond I*"), the California Supreme Court held that, under the First Amendment to the United States Constitution, the plaintiffs had the right to solicit signatures on an initiative petition and to handbill in connection therewith at one of Homart's shopping centers. This holding was overturned in *Diamond v. Bland*, 11 Cal. 3d 331, 521 P. 2d 460 (1974), *cert. den.*, 419 U. S. 885 (1974), *rehg. den.*, 419 U. S. 1097 (1974), *rehg. den.*, 421 U. S. 972 (1975) (hereafter "*Diamond II*"), where the California Supreme Court held that, by reason of this Court's subsequent decision in *Lloyd Corp. v. Tanner*, 407 U. S. 551 (1972), "the due process clause of the United States Constitution protects the property interests of the shopping center owner from infringement" under either the First Amendment or the California Constitution. 11 Cal. 3d at 335, n. 4. *Diamond II*, in turn, was reversed by the majority of the California Supreme Court in the instant case. The third case in which Homart has been a party is *Homart Development Co. v. Fein*, 110 R. I. 1372, 293 A. 2d 493 (1972), a decision of the Rhode Island Supreme Court that the owner of a shopping center could bar political candidates from soliciting on its premises.

2. Although the narrow issue in the instant case involved the right to solicit signatures on a petition to the government, its holding will presumably apply to a wide variety of other "speech and petition rights" protected by the California Constitution. Sl. Op., pp. 17-18. The decision below, therefore, would apparently mandate that PruneYard must, "[i]rrespective of how controversial, offensive, distracting or extensive such conduct may be" (*Lloyd*, 407 U. S. at 564, n. 11), nevertheless grant an easement on its private premises for all such purposes.

a "shopping center" can be of practically any size, ranging from large regional centers like the Lloyd Center to local neighborhood centers like PruneYard Center with but a few independent stores,<sup>3</sup> as well as take various shapes.<sup>4</sup> A variety of ownership interests may also be at issue, ranging from joint venture arrangements to multiple ownership relationships where several facilities within the "shopping center" own their own premises

### 3. As one court observed:

The term 'shopping center' can be applied to any number and variety of merchandising and service operations. What is a shopping center? Does a shopping center become such by reason of having seven, seventeen or seventy places of business? Does it become a shopping center because it is an outdoor operation? One of the reasons that the contention of the defendants cannot be a rule of law is because there is no legally acceptable definition of the phrase 'shopping center.'

*Freeman v. Retail Clerks Union*, 45 LRRM 2334, 2337 (Wash. Sup. Ct. 1959), *rev'd on preemption grnds*, 58 Wash. 2d 426, 363 P. 2d 803 (1961). Many of the "shopping centers" encompassed by the decision below are similar to that involved in *Taggart v. Weinacker's*, 397 U. S. 233 (1970), *viz.*, a single retail store containing a supermarket and a small drug department, all owned and operated by the same company, with an adjacent parking lot able to accommodate two rows of automobiles. *See Shopping Center World*, January 1979, pointing out that approximately 53% of "shopping center" sales result from centers with a gross leaseable area of less than 200,00 square feet.

4. For example, there are many single unit department stores or discount houses which offer not only their own merchandise but also the merchandise of others through leased departments or concessions and which have parking areas open to the public. As one commentator observed, such an enterprise "is essentially a shopping center by itself, under one roof." *Applebaum, Consumption and the Geography of Retail Distribution in the United States*, Michigan State University Business Topics, Summer 1967, p. 31, n. 4. In addition, there are also retail enterprises which, instead of being constructed on a horizontal plane, as in the case of many suburban shopping centers, are constructed on a vertical plane because of space limitations such as those which exist in downtown locations. Similarly situated also are those multiple stores, shops and offices located within a single building with a common entranceway, stairwells and corridors, or the multiple manufacturing or retail establishments located within industrial parks and connected only by means of a series of private roads fronting on a public artery. All such enterprises, regardless of size, shape or the terms used to describe them, provide the "public forums" sought here.



and parking lots while granting easements to adjacent stores. Thus, the decision in this case will have substantial consequences on many types of businesses, and will impact significantly on the future development of shopping centers. It is for this reason that Homart seeks to present its views.

Sears, Roebuck and Co. (hereafter "Sears") is the nation's largest retailer, employing more than 400,000 employees and maintaining over 2,500 retail stores located in every state, the District of Columbia, and Puerto Rico. Some of these stores are freestanding. Others are in shopping centers. Where the stores are located in shopping centers, Sears' position varies from that of the smallest mall tenant to that of the largest anchor department store. In many shopping centers, Sears owns the portion of the center where its store is located, as well as the surrounding parking areas. In these centers, as well as in the centers where Sears is not a landowner, Sears has easement rights in all areas open to the public for its own use and the use of its customers. In a substantial number of centers, Sears also has agreed to pay a portion of the financial burdens of the malls and parking areas in consideration for those areas being designed, used, and maintained in a manner conducive to commercial activity. If, by reason of the decision below, those areas can now be used for non-commercial purposes, and the Sears' easements can now be obstructed, Sears' property will be taken without just compensation.<sup>5</sup> If openness to the public is the touchstone for permitting access, as the decision below concluded, this justification "could be made with respect to almost every retail and service establishment in the country, regardless of size or location." *Central Hardware Co. v. N. L. R. B.*, 407 U. S. 539, 547 (1975). Such stores "are all open to the public in the sense that customers and potential customers are invited and encouraged to enter. In terms of being

5. Sears is currently litigating a related issue of access before the California Supreme Court in *Sears, Roebuck and Co. v. San Diego District Council of Carpenters* (No. LA 30562), on remand from this Court's decision at 436 U. S. 180 (1978)).

open to the public, there are differences only of degree—not of principle—between a free standing store and one located in a shopping center, between a small store and a large one, between a single store with some walls and [one with] . . . elaborate walls and interior landscaping." *Lloyd*, 407 U. S. at 565-566. Sears believes that in the instant case, as in *Central Hardware*, to accept such an argument "would . . . constitute an unwarranted infringement of private property rights protected by the Fifth and Fourteenth Amendments." *Central Hardware*, 407 U. S. at 547. The question presented by this case is thus a matter of substantial interest to Sears and other retailers.

## REASONS FOR GRANTING THE APPEAL

### I.

#### A. The Decision Below Violates PruneYard's Rights Under the Fifth and Fourteenth Amendments.

The State in this case has violated PruneYard's Fifth and Fourteenth Amendment rights by appropriating its property without compensation. The decision below would compel PruneYard to open its property to anyone who wishes to use it for free speech on its specially developed and expensively maintained commercial property. Such activities must be tolerated notwithstanding that, as in this case, they have no connection whatsoever with the views of the center's owners or occupants or with the conduct of their businesses. The property owner is thus required to provide, free of charge, its valuable facilities to be utilized in a manner that creates additional safety problems, increases the dangers of violence, and that may distract and even drive away those very customers it has attracted to its facility. Other customers will be enticed to devote their limited shopping time to a variety of competing uses. There will necessarily be a substantial adverse effect on normal commercial activities and, in effect, a subsidization by the property owner of a competing use of its property.

This appropriation of private property creates "a court-made law wholly disregarding the constitutional basis on which private ownership of property rests in this country." *Hudgens v. N. L. R. B.*, 424 U. S. 507, at 517, quoting from *Logan Valley*, 391 U. S. at 333 (Black J., dissenting). This Court heretofore has recognized the importance of its responsibility to define the permissible scope of free speech activities on both private<sup>6</sup> as well as public property.<sup>7</sup> In *Lloyd*, for instance, certiorari was granted to determine whether permitting virtually identical activity on virtually identical premises "violates rights of private property protected by the Fifth and Fourteenth Amendments." That case then declared that, by reason of those Amendments, "this Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only." 407 U. S. at 552-553 and 568. To the contrary, this Court has repeatedly stated that "the Fifth and Fourteenth Amendment rights of private property owners . . . must be respected and protected."<sup>8</sup>

The California Supreme Court in the present case has disregarded these pronouncements. It has sought, as the dissent

6. See, e.g., *Marsh v. Alabama*, 326 U. S. 501 (1946); *Amalgamated Food Employees Union v. Logan Valley*, *supra*; *Lloyd v. Tanner*, *supra*.

7. See, e.g., *Lovell v. Griffin*, 303 U. S. 444 (1938); *Cox v. Louisiana*, 379 U. S. 559 (1965); *Adderley v. Florida*, 385 U. S. 39 (1966).

8. See also *Marsh v. Alabama*, 326 U. S. at 509 (1945) ("When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion . . ."); *Logan Valley*, 391 U. S. at 309 ("This case presents the question whether peaceful picketing of a business enterprise located within a shopping center can be enjoined on the ground that it constitutes an unconsented invasion of the property rights of the owners of the land on which the center is situated"); and *Central Hardware Co. v. N. L. R. B.*, 407 U. S. 539, 547 (1972) (to subject the owner of private property to the commands of the First Amendment, absent the assumption "to some significant degree of the functional attributes of public property devoted to public use . . . [would] constitute an unwarranted infringement of long-settled rights of private property protected by the Fifth and Fourteenth Amendments").

below observed, "to circumvent *Lloyd* by relying upon the 'liberty of speech clauses' of the California Constitution . . . [S]uch an analysis is clearly incorrect, because the owners of defendant Pruneyard Shopping Center possess *federally* protected property rights which do not depend upon the varying and shifting interpretations of state constitutional law for their safeguard and survival . . . [S]upremacy principles would prevent [a state court] . . . from employing state constitutional provisions to defeat defendant's federal constitutional rights." Sl. Op. pp. 3-4 (dissenting opinion; emphasis the author's), quoting from *Diamond II*, 11 Cal. 3rd at 335, n. 4.

The substantial deprivation of a property owner's rights, which would result from the decision below, is not mitigated by the illusory adoption of "reasonable regulations" (Sl. Op., pp. 18-19) of time, place and manner. The State is requiring the property owner to assume "all of the attributes of a state-created municipality" (*Lloyd*, 407 U. S. at 569) to determine and enforce the appropriate time, place and manner for the speech activities; to provide the attendant maintenance and security services; and to assume the risk of any potential disruption or damage liability. The owner would be required to assume these nebulous obligations, and to absorb the concomitant loss of business that would result from permitting competing uses, even though there may be no means by which he can, through his own actions, remove the communicants' source of discontent. As long as the Respondents chose PruneYard Center as a desirable place to communicate their message, PruneYard's owners would be forced to suffer the substantial and expensive burdens imposed by that use.

Such a significant State confiscation of private property in derogation of paramount federal Constitutional rights raises an important issue which warrants review by this Court.



**B. The Decision Below Raises an Important Constitutional Question Which Has Not Been, But Should Be, Settled by This Court.**

This Court has "vigorously and forthrightly rejected" the concept that those "who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please."<sup>9</sup> The Respondents similarly have no constitutional right to require that PruneYard furnish them with a place to engage in their activities.

The desire to use private shopping center property for *unrelated* competing activities is one which, as here, occurs with almost daily frequency and variety. Homart, in fact, receives an average of three such requests each week. In today's prevailing social climate there is an expanding desire to propagandize an infinite variety of political, social, religious, commercial, charitable, and economic ideas. Evidence of these phenomena can be found, for example, in the recent litigation involving the exercise of various First Amendment activities at locations other than shopping centers.<sup>10</sup> The attractiveness of private shopping

9. *Adderley v. Florida*, 385 U.S. 39, 48 (1966), citing *Cox v. Louisiana*, 379 U.S. 536, 559 (1965). See also *Jones v. North Carolina Prison Union*, 433 U.S. 119 (1977); *Greer v. Spock*, 424 U.S. 828 (1976); *Younger v. Harris*, 401 U.S. 37 (1971); *Cameron v. Johnson*, 390 U.S. 611 (1968); *N. L. R. B. v. Babcock & Wilcox Co.*, 351 U.S. 105 (1965); *Kovacs v. Cooper*, 336 U.S. 77 (1949); and *Carpenters & Joiners Union v. Ritter's Cafe*, 315 U.S. 722 (1942).

10. See, e.g., *Jones v. North Carolina Prison Union*, *supra* (prison); *Greer v. Spock*, *supra* (military base); *Madison School District v. Wisconsin Employment Relations Board*, 429 U.S. 167 (1967) (School Board meeting); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (private home); *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969) (high school classroom); *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978) (public streets); *Knights of the KuKlux Klan v. East Baton Rouge School Board*, 578 F.2d 1122 (5th Cir. 1978) (school gymnasium); *Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977) (state capitol grounds); *Wright v. Chief of Transit Police*, 558 F.2d 67 (2nd Cir. 1977) (subway

(Footnote continued on next page.)

centers, as a place of communication, both peaceful and otherwise, is apparent.<sup>11</sup> If PruneYard Center must be made available to Respondents for their desired use, others will obviously have the same right to appropriate such property either to disagree with Respondents or for a wide spectrum of other personal reasons.

The instant case presents a far different situation from that involved in cases where either a federal statute, such as the National Labor Relations Act, or public health and safety concerns, preclude a property owner from exercising an absolute right to utilize his property in any desired manner whatsoever. "It is not every interference with property rights that is within the Fifth Amendment . . . [I]nconvenience, or even some dislocation of property rights, may be necessary in order to safeguard the right to collective bargaining"<sup>12</sup> or other rights granted "by the same authority, the National Government, that preserves property rights."<sup>13</sup> Similarly, it is undisputed that

(Footnote continued from preceding page.)

system); *Moore v. Newell*, 548 F.2d 671 (6th Cir. 1977) (retail store); *Sellers v. Regents of the University of California*, 432 F.2d 493 (9th Cir. 1970) (university building); *Women Strike for Peace v. Hickel*, 420 F.2d 597 (D.C. Cir. 1969) (national park); *Powe v. Miles*, 407 F.2d 73 (2nd Cir. 1968) (university football field); and *Wolin v. Port of New York Authority*, 392 F.2d 83 (2nd Cir. 1968) (bus terminal).

11. See, e.g., Weiss, *Shopping Center Malls; The Next Place for Teen-Age Riots*, *Advertising Age*, April 14, 1969, p. 106, and King, *Supermarkets Hub of Suburbs*, *N. Y. Times*, Feb. 7, 1971, § 1 at p. 58, cols. 4-6; and *How Shopping Malls Are Changing Life In The U. S.*, 74 U.S. News & World Report, pp. 43-46, June 18, 1973.

12. *N. L. R. B. v. Cities Service Oil Co.*, 122 F.2d 149, 152 (2nd Cir. 1941). See, *Republic Aviation Corp. v. N. L. R. B.*, 324 U.S. 793 (1945); *Babcock & Wilcox*, 351 U.S. at 113.

13. *Babcock & Wilcox*, 351 U.S. at 112. Even in this situation, "[a]ccommodation between [the two rights] must be obtained with as little destruction of one as is consistent with the maintenance of the other." *Ibid.* The locus of this accommodation, moreover, "may fall at different points along the spectrum depending on the nature and strength of the respective [statutory] rights and private property rights asserted in any given context." *Hudgens*, 424 U.S. at 526.



property rights may be required to yield to public health, safety, morals, or general welfare interests.<sup>14</sup> Here, however, the objective of the proposed use was neither sanctioned by federal law nor necessary to effectuate a compelling state interest. As in *Lloyd*, there was no relationship in this case between the purpose of the expressive activity and the business of the owner or tenants of PruneYard Center; nor was access essential in order to provide Respondents with a reasonable opportunity to convey their message. PruneYard Center was not found to be dedicated to public use or to constitute the "functional equivalent" of a municipality. No attempt was even made by the court below to evaluate or accommodate the competing interests. To find that, in such circumstances, there is an overriding public interest sufficient to appropriate private property, establishes, as the court below acknowledged (Sl. Op., pp. 10-11), a new definition of the power of the State to regulate private property. The present case is an appropriate vehicle for this Court to determine whether this new principle is compatible with the Federal Constitution.

14. See, e.g., *Valley of Euclid v. Ambler Realty Co.*, 272 U. S. 365 (1926). Even in such cases, of course, the relationship must be "substantial" and neither "arbitrary" or "unreasonable." *Id.* at 395. The public interests must be "promoted" by the intrusion upon private property rights (*Nectow v. Cambridge*, 277 U. S. 183, 188 (1928)), and the State may not "cut so deeply into a fundamental right normally associated with the ownership of residential property . . . [as to constitute] a taking of property without due process and without just compensation." *Moore v. East Cleveland*, 431 U. S. 494, 520 (1977) (Stevens, J., concurring). The diminution in the value of the property must also not be extensive and, even where it is substantial, compensation is still generally required where "government regulation involves actual physical invasion and use of the owner's land by the public." Note, *Owners' Fifth Amendment Property Rights Prevent A State Constitution From Providing Broader Free Speech Rights Than Provided By the First Amendment*, 86 Harv. L. Rev. 1592, 1602-1604 (1973). None of these findings were made in the opinion below. The lower court, at the least, was required to support its analogy to public interest situations (Sl. Op., pp. 8-9) by evaluating "the character and extent of the infringement on property caused by the measure, compared with other valid police power regulations, to determine whether the impairment constituted a compensable taking under the fifth and fourteenth amendments." *Id.* at 1602.

### C. Review by This Court Is Warranted to Resolve a Substantial Conflict Among the States.

Prior to the decision below, post-*Lloyd* decisions of other state courts had uniformly held, as the California Supreme Court itself had declared in *Diamond II*, that supremacy principles prevented state constitutional provisions from being used to defeat a property owner's federal constitutional rights. In *Lenrich Associates v. Heyda*, 264 Or. 122, 504 P. 2d 112 (1972), for example, a plurality of the Oregon Supreme Court read *Lloyd* to be founded upon the protection afforded a property owner by the Fifth and Fourteenth Amendments which prevailed over both asserted First Amendment rights as well as the rights of expression and religious freedom contained in the Oregon Constitution. 504 P. 2d at 114-116. See also *Homart Development Co. v. Fein*, *supra*; and *State v. Marley*, 54 Haw. 450, 509 P. 2d 1095 (1973).

This case thus presents a recurrent question which has occasioned a conflict among state courts. Such conflict is a repetition of the disharmony occasioned by both pre-*Lloyd* state court litigation seeking to interpret this Court's now rejected *Logan Valley* analysis<sup>15</sup> and pre-*Sears* state court decisions on the issue of whether peaceful union trespassory activity on private property was preempted.<sup>16</sup> Review by this Court to provide the requisite guidance for the state courts is similarly desirable here.

15. Compare, e.g., *Diamond I*, *supra*, *Sutherland v. Southcenter Shopping Center*, 3 Wash. App. 833, 478 P. 2d 792 (1970), and *State v. Miller*, 280 Minn. 566, 159 N. W. 2d 895 (1968) (*per curiam*) with *People v. Goduto*, 21 Ill. 2d 605, 174 N. E. 2d 385, *cert. den.*, 368 U. S. 927 (1961).

16. See the cases discussed in *Sears*, 98 S. Ct. at 1751, n. 7.

## II.

**BY MANDATING THAT PRIVATE PROPERTY BE OPEN TO ANY EXPRESSIVE ACTIVITY, THE DECISION BELOW VIOLATES A PROPERTY OWNER'S FIRST AMENDMENT RIGHTS.**

By mandating "an enforceable right of access" to PruneYard Center's private property for the expressive activities of Respondents, the California Supreme Court has created "governmental coercion [which] . . . at once brings about a confrontation with the express provisions of the First Amendment." *Miami Herald Publishing Co. v. Tornillo*, 418 U. S. 241, 254 (1974). This Court has long recognized that "the right of freedom of thought protected by the First Amendment against state action includes . . . the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U. S. 705, 714 (1977). Here, as in *Wooley*, the State may not "constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property." *Id.* at 713. In doing so, the State "transcends constitutional limitations on [its] power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 642 (1943).

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette*, 319 U. S. at 642. Here, too, the State, within its own constitutional proscriptions, cannot dictate to PruneYard Center's owners an enforceable right of access which that Center's owners would otherwise deny. By mandating that PruneYard permit its property be used for the dissemination of ideas and messages that its owners may not espouse, or wish to

disseminate, the State is denying PruneYard's owners their First Amendment rights.

## III.

**THE DECISION BELOW IMPERMISSIBLY DENIES PROPERTY OWNERS RIGHTS GRANTED BY FEDERAL LAW.**

Under the National Labor Relations Act, as already noted (see notes 12 and 13, *supra*), employers, including shopping center owners and retail store operators, may exclude non-employee union activities on private property where adequate alternative channels of communication exist. *Hudgens v. N. L. R. B.*, *supra*; *Central Hardware Company v. N. L. R. B.*, *supra*. The employer may not, however, discriminate against a union by allowing others to engage in similar activity; such discrimination is forbidden by Section 8(a)(1) of the Labor Act.<sup>17</sup> The decision below, by requiring that PruneYard Center permit *non-union* speech and petitioning on its premises, has thereby concomitantly compelled the Center to surrender a federally protected right to exclude *union* speech and petitioning. This result impermissibly regulates conduct encompassed by the national labor law. As this Court noted in *Sears*, "there is a constitutional objection to state court interference with conduct actually protected by the [Labor] Act. Considerations of federal supremacy, therefore, are implicated . . ." 98 S. Ct. at 1759 (footnote omitted). See also, *Machinists v. Wisconsin Employment Relations Commission*, 427 U. S. 132 (1976).

It is this very potential of state interference with the federal labor scheme which the preemption doctrine was designed to prevent. The responsibility for determining whether a union has a right of access is a matter which "in the first instance is delegated to the [National Labor Relations] Board, as part of its 'responsibility to adapt the Act to changing patterns of indus-

17. *N. L. R. B. v. Babcock & Wilcox Co.*, 351 U. S. at 112. See also, e.g., *Kern's Bakeries*, 227 NLRB 1329 (1977); *Sunnyland Packing*, 227 NLRB 590 (1976); and *Pilot Freight Carriers, Inc.*, 223 NLRB 286 (1976).

trial life.' " *Sears*, 98 S. Ct. at 1765 (Blackmun, J., concurring), quoting from *N. L. R. B. v. Weingarten, Inc.*, 420 U. S. 251, 266 (1975). In these circumstances, "due regard for the federal enactment requires that state jurisdiction must yield." *San Diego Building Trades Council v. Garmon*, 359 U. S. 236, 244 (1959).

### CONCLUSION

For all of the foregoing reasons, as well as those set forth in the Jurisdictional Statement, the Appeal should be granted.

Respectfully submitted,

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# In the Supreme Court

OF THE

## United States

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OCTOBER TERM, 1979

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**No. 79-289**

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PRUNEYARD SHOPPING CENTER, ET AL.,

*Appellants,*

VS.

MICHAEL ROBINS, ET AL.,

*Appellees.*

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**On Appeal From the Supreme Court  
of the State of California**

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### **MOTION TO DISMISS**

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# In the Supreme Court

OF THE

United States

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OCTOBER TERM, 1979

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No. 79-289

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PRUNEYARD SHOPPING CENTER, ET AL.,  
*Appellants,*

VS.

MICHAEL ROBINS, ET AL.,  
*Appellees.*

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On Appeal From the Supreme Court  
of the State of California

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**MOTION TO DISMISS**

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Pursuant to Supreme Court Rule 16 (1) (b), Appellees hereby move to dismiss the appeal in the above entitled case on the ground that it does not present a substantial federal question.

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## **OPINION BELOW**

The opinion of the Supreme Court of California, from which this appeal is taken, is entitled *Robins v. Pruneyard Shopping Center*, and is reported at 23 Cal.3d 899, 153

Cal.Rptr. 854, 592 P.2d 341 (1979). The opinion is set forth in Appellants' Jurisdictional Statement as Appendix C.

### CONSTITUTIONAL PROVISIONS INVOLVED

#### First Amendment, United States Constitution:

Congress shall make no law . . . abridging the freedom of speech . . .

#### Fifth Amendment, United States Constitution:

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

#### Fourteenth Amendment, United States Constitution:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .

#### Article I, Section 2, California Constitution:

Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

#### Article I, Section 3, California Constitution:

The people have the right to instruct their representatives, petition the government for the redress of grievances, and assemble freely to consult for the common good.

#### Article II, Section 8, California Constitution:

##### *Initiative*

(a) The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them.

(b) An initiative measure may be proposed by presenting to the Secretary of State a petition that sets forth the text of the proposed statute or amendment to the Constitution and is certified to have been signed by electors equal in number to 5 percent in the case of a statute, and 8 percent in the case of an amendment to the Constitution, of the votes for all candidates for Governor at the last gubernatorial election . . . .

#### Article II, Section 9, California Constitution:

##### *Referendum*

(a) The referendum is the power of the electors to approve or reject statutes or parts of statutes except urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the State.

(b) The referendum measure may be proposed by presenting to the Secretary of State, within 90 days after the enactment date of the statute, a petition certified to have been signed by electors equal in number to five percent of the votes for all candidates for Governor at the last gubernatorial election, asking that the statute or part of it be submitted to the electors . . . .

#### Article II, Section 14, California Constitution:

##### *Recall Petitions*

(a) Recall of a State officer is initiated by delivering to the Secretary of State a petition alleging reason for recall. . . . Proponents have 160 days to file signed petitions.

(b) A petition to recall a statewide officer must be signed by electors equal in number to 12 percent of the last vote for the office, with signatures from each of five counties equal in number to 1 percent of the

last vote for the office in the county. Signatures to recall Senators, members of the assembly, members of the Board of Equalization, and judges of courts of appeal and trial courts must equal in number 20 percent of the last vote for the office. . . .

### QUESTIONS PRESENTED

1. Does the United States Constitution prohibit the State of California from regulating the use of private property within its borders by requiring that the owner of a shopping center not deny access to individuals seeking to solicit signatures upon petitions to the government, where such conduct is guaranteed by the State Constitution, and where that State has found that the public welfare would be substantially impaired if such access is denied?

2. By invoking the State Constitution to protect the right of individuals to solicit signatures upon petitions to the government upon the premises of a privately owned shopping center, has the State of California adversely affected any First Amendment rights held by the landowner so as to raise a substantial federal question?

### STATEMENT OF THE CASE

On November 16, 1975, Appellees went to the Pruneyard Shopping Center for the purpose of soliciting the signatures of members of their community upon a petition they intended to send to their governmental representatives, including the President of the United States. The petition condemned a resolution which had been passed by the United Nations labeling Zionism as a form of racism.

Appellees were at that time students of the 1976 confirmation class at Temple Emanu-El, located in San Jose,

and a teacher of that class. The petition was part of a class project. Other members of the class went to other nearby shopping centers, and a group went to the airport.

Members of Appellees' confirmation class were of high school age. School was then in session, and participation in the project was necessarily restricted to weekends. Appellees had learned from prior experience that publicly owned areas of downtown San Jose, and neighboring municipalities, are inadequate for a petition project by reason of the scarcity of people to be found therein.

Moreover, unlike handbilling and leafleting, which conduct is not at issue herein, Appellees' activity could not be effectively carried out on the public sidewalks surrounding the center, or elsewhere. Where virtually all people drive onto the shopping center premises, and do not have to set foot on its publicly owned surroundings, leafleting is possible only because of its instantaneous nature. The discussion of, and signing of petitions requires personal contact in a manner to which the roadside forums are not conducive.

Upon arriving at the Pruneyard, Appellees went to the central courtyard and set up a card table in one corner of the square. No sign was placed on the table. Appellees proceeded to ask passersby to sign the petitions. The project was well received by shopping center patrons.

Appellees had a self-imposed rule that they would not harass people at the shopping center, or block entrances to stores. Appellees at all times conducted themselves in a courteous and orderly manner.



After five to ten minutes, Appellees were advised by security personnel of the shopping center that their conduct violated Appellants' regulations. They were asked to leave, and did so.

Upon subsequent contact with Appellants, wherein Appellees offered to submit to any reasonable regulations so as to continue their project, Appellants stated that the activity would not be allowed under any circumstances.

Appellees filed for an injunction to enjoin Appellants from prohibiting the solicitation of signatures for their petitions on shopping center grounds. The Superior Court of California, County of Santa Clara, denied the request. The Court of Appeal affirmed the judgment of the trial court.

Appellees' Petition for Hearing in the California Supreme Court was granted, and after consideration of the parties' briefs, several amicus briefs on both sides of the matter, and oral argument by both sides, that court reversed the Judgment of the trial court. After considering and denying Appellants' Petition for Rehearing, the California Supreme Court remitted the cause to the trial court with instructions that the injunction be issued as requested.

Appellants immediately sought from this honorable Court a stay of the mandate of the California Supreme Court. That application was denied by Mr. Justice Rehnquist.

The California Supreme Court had been briefed at length by Appellees as to the socio-economic circumstances

existing in California which make access to shopping centers necessary for the effective exercise of the conduct at issue. The evidence indicated that shopping centers are the gathering places for California communities, and that privately owned shopping centers, because of their planned convenience, wide range of goods and services, and attractiveness to businesses which formerly were situated in downtown areas, not only have replaced the traditional public forums but were the principal cause of their demise.

The Fair Political Practices Commission, a California administrative agency established by the legislature to oversee the State's electoral processes, appeared before the California Supreme Court as an amicus curiae, and urged the court to rule in favor of Appellees. The California Supreme Court expressly noted the position of that state regulatory body that "because of the large number of signatures required to succeed in an initiative, referendum or recall drive, guaranteeing access to voters is essential to make meaningful the right to mount such a drive." (*Robins v. Pruneyard*, 23 Cal.3d 899, 908, 153 Cal.Rptr. 854, 858-859 (footnote 4)).

Having duly considered the record before it, and the arguments on each side of the issue, the California Supreme Court modified the findings of the trial court as to the availability and adequacy of alternative forums, and found instead that "[s]hopping centers to which the public is invited can provide an essential and invaluable forum to exercising [the right to petition and speech incidental thereto]." (*Robins v. Pruneyard*, 23 Cal.3d 899, 910, 153 Cal.Rptr. 854, 860)

### SUMMARY OF ARGUMENT

The State of California has imposed, by way of injunction, a specific restriction upon the use of real property within its borders. The Supreme Court of California imposed the restriction after finding that fundamental rights guaranteed by the State Constitution were being substantially impaired, and that the restriction was reasonable and necessary for the preservation of such rights, and that Appellees and the general public in California would otherwise suffer irreparable injury.

The power of the states to impose reasonable restrictions upon the use and control of private property is firmly established, and no interpretation of Fifth and Fourteenth Amendment rights by this Court, including those decisions relating specifically to access to shopping centers, support Appellants' argument that State law may not provide a basis for the restrictions imposed upon Appellants herein. The decision of the Supreme Court of California to grant injunctive relief in order to protect Appellees and the general public from irreparable injury, after a full and fair hearing on the issues, is not, therefore, repugnant to Appellants' Fifth and Fourteenth Amendment rights.

The similarity Appellants say exists between the conduct at issue herein and that involved in previous shopping center decisions by this Court is irrelevant. Where a matter may have been decided upon both federal and state grounds, appellate review of the federal question asserted is improper if the action of the State court can rest upon an adequate and independent State ground. Given the freedom of the States in interpreting the pro-

visions of their own constitutions, the action of the California Supreme Court which is expressly based upon the State Constitution, does not present a matter for review by this Court.

Nor can it reasonably be said that the restrictions imposed upon Appellants' use and control of private property raise a substantial question as to Appellants' First Amendment rights. The record in the case contains no indication that any idea or philosophy espoused by Appellees has been attributed to Appellants, or was in any way forced upon them for adoption. It cannot reasonably be said that the forced espousment of ideas, found to be objectionable in the cases cited by Appellants, is present in this situation where the interplay takes place in a common area of a shopping center between members of the public and individuals who are in no way identifiable as representatives of the property owner.

There being no substantial federal question warranting review by this Court, it is respectfully requested that the appeal be dismissed.

## I

**THE DECISION OF THE SUPREME COURT OF CALIFORNIA THAT THE STATE CONSTITUTION PROTECTS THE RIGHT TO SOLICIT SIGNATURES ON PETITIONS TO THE GOVERNMENT ON THE PREMISES OF A PRIVATELY OWNED SHOPPING CENTER IS NOT REPUGNANT TO APPELLANTS' RIGHTS UNDER THE FIFTH OR FOURTEENTH AMENDMENTS**

**A. The Power of the States to Impose Reasonable Restrictions Upon the Use and Control of Private Property Has Not Been Diminished By Decisions of This Court Concerning Access to Shopping Centers**

The validity of Appellants' jurisdictional contentions depends on whether *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), and subsequent decisions of this Court, vested owners of shopping centers with an absolute and unassailable constitutional right to deny access to individuals seeking to use such property as a forum of expression. That contention, as applied to this case, would bar States from imposing reasonable restrictions on the use and control of shopping center property in spite of a finding that such restrictions were necessary to prevent irreparable injury and to protect the general welfare of the State.

Such a reading of this Court's decisions concerning access to shopping centers would constitute a severe divergence from well established principles in which private property rights are subject to the State's power to impose reasonable restrictions on the use and control of land.

No clearer statement of the fundamental principle underlying this case can be found than that of Chief Justice Shaw of the Supreme Judicial Court of Massachusetts:

"We think it is a settled principle, growing out of the nature of a well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All the property in this commonwealth, as well that in the interior as that bordering on the tidewaters, is derived directly or indirectly from the government, and held subject to those general regulations, which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient."

*Commonwealth v. Alger*, 7 Cush. 53, 84, 61 Mass. 53, 84.

Relying principally on *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), and *Hudgens v. NLRB*, 424 U.S. 507 (1976), Appellants contend that "the controlling decisions establish that a shopping center owner has a right under the Fifth and Fourteenth Amendments to bar those who would conduct speech activities over his objection." (Jurisdictional Statement at page 6).



A closer examination of *Lloyd*, as clarified by *Hudgens*, shows it not to be controlling herein.

*Lloyd* involved an action by a group of individuals seeking to enjoin a shopping center from denying them access for the purpose of handbilling on the basis that such conduct was protected under the First Amendment. This Court there held that, under the facts presented, the First Amendment could not offer protection as against private, as opposed to state action.

"The basic issue in this case is whether respondents in the exercise of asserted First Amendment rights, may distribute handbills on Lloyd's private property contrary to a policy enforced against *all* handbilling. In addressing this issue, it must be remembered that the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on *state* action, not on action by the owner of private property used nondiscriminatorily for private purposes only."

*Lloyd Corp. v. Tanner*, 407 U.S. at 567.

After discussing the distinctions which allowed a finding of state action as to private property, such as in *Marsh v. Alabama*, 326 U.S. 501 (1946), this Court in *Lloyd* found the necessary state action ingredient of First Amendment protection to be lacking:

"We hold that there has been no such dedication of Lloyd's privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights." (407 U.S. at 570)

Any confusion as to whether *Lloyd* was decided upon the inapplicability of the First Amendment or upon an expansion of the shopping center owner's property rights was put to rest in *Hudgens v. NLRB*, 424 U.S. 507 (1976). In *Hudgens* the Court gave exclusive emphasis to above-discussed language in *Lloyd* concerning the non-dedication of property to public use, the absence of state action, and the resulting nonavailability of First Amendment protection. (424 U.S. at 518-520). Having so clarified the meaning of *Lloyd*, the Court in *Hudgens* concluded as follows:

"It conversely follows, therefore, that if respondents in the *Lloyd* case did not have a First Amendment right to enter that shopping center to distribute handbills concerning Vietnam, then the pickets in the present case did not have a First Amendment right to enter this shopping center for the purpose of advertising their strike against the Butler Shoe Co.

"We conclude, in short, that under the present state of the law the constitutional guarantee of full expression has no part to play in a case such as this." (424 U.S. at 520-521).

This extensive examination of the *Lloyd* decision, as clarified by *Hudgens*, has been necessary to demonstrate that it is not applicable and therefore not controlling as to the issues in this case. The decision in *Lloyd* that a First Amendment right of access to shopping centers does not exist because state action is absent, did not establish a new constitutional right of shopping center owners to bar all expressive activity under any circumstances. There has been no controlling pronouncement in any case which immunizes shopping center owners from reasonable access

regulations properly based on grounds other than the First Amendment.<sup>1</sup>

It is clear, therefore, that *Lloyd* does not prohibit a state from imposing an otherwise proper regulation upon the use and control of a privately owned shopping center.

Appellees do not question the fact that the owners of private shopping centers possess constitutional rights under the taking and due process clauses of the Fifth and Fourteenth Amendments. But to say that the constitutional value of protecting private property is "relevant", as this Court did in *Lloyd* in determining the reach of the First Amendment (407 U.S. at 567), is certainly not to hold that either the due process or taking clause is violated when access to a shopping center is mandated upon an adequate and independent state ground, or any other permissible basis. Indeed, in *Hudgens* this Court specifically disavows any such implication, noting that "[S]tatutory or common

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<sup>1</sup>The possibility of mandated access and other regulations as to the use and control of shopping center property, on grounds other than the First Amendment, was recognized in *Lloyd*: "This is not to say that no differences may exist with respect to government regulation or rights of citizens arising by virtue of the size and diversity of activities carried on within a privately owned facility serving the public. There will be, for example, problems with respect to public health and safety which vary in degree and in the appropriate government response, depending upon the size and character of a shopping center, an office building, a sports arena, or other large facility serving the public for commercial purposes. We do say that the Fifth and Fourteenth Amendment rights of private property owners, as well as the First Amendment rights of all citizens, must be respected and protected. The framers of the Constitution certainly did not think these fundamental rights of a free society are incompatible with each other. There may be situations where accommodations between them, and the drawing of lines to assume due protection of both, are not easy. But on the facts presented in this case, the answer is clear." *Lloyd Corp. v. Tanner*, 407 U.S. at 569-570 (1972).

law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others," (424 U.S. at 513) and by remanding the case to the NLRB to decide because "the rights and liabilities of the parties in this case are dependent *exclusively* upon the National Labor Relations Act" (424 U.S. at 527, emphasis added).

The very important distinction and difference between determining that there is no federal *constitutional* access right and a decision that a state unconstitutionally infringes upon property rights if it provides such a right is illustrated by the series of cases dealing with racial discrimination in privately owned public accommodations. Prior to the enactment of the Civil Rights Act of 1964, this Court was faced in several cases with the question whether there was sufficient state action to invoke the Fourteenth Amendment's equal protection guarantee when a private proprietor refused to serve or accommodate blacks. See, e.g., *Griffin v. Maryland*, 378 U.S. 130 (1964); *Robinson v. Florida*, 378 U.S. 153 (1964); *Lombard v. Louisiana*, 373 U.S. 267 (1963); *Bell v. Maryland*, 378 U.S. 226 (1964). Those members of the Court who insisted that there was insufficient state involvement in particular instances to invalidate trespass convictions were very careful to note that their state action views did not implicate or restrict

"the power of Congress to pass a law compelling privately owned businesses to refrain from discrimination on the basis of race. Our sole conclusion is that Section 1 of the Fourteenth Amendment does not prohibit privately owned restaurants from choosing their own customers . . . as long as some valid regulatory statute does not tell him to do otherwise." (*Bell v.*

*Maryland*, supra, 378 U.S. at 343 (Black, J. dissenting, joined by Harlan, J. and White, J.)

And when the issue of the validity of the nationwide public accommodations statute of 1964 was presented in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), the Court unanimously rejected the contentions that the statute violated substantive due process or constituted a taking (379 U.S. at 258-261). Indeed, Mr. Justice Black, who had vigorously maintained in *Bell* that there was no state action in simply invoking the general trespass laws to oust a black from a restaurant, wrote separately in *Heart of Atlanta* to note that

"this court has consistently held that the regulation of the use of property by the Federal Government or by the States does not violate either the Fifth or the Fourteenth Amendment . . . A regulation such as that [in the] 1964 Civil Rights Act *does not even come close* to being a 'taking' in the constitutional sense . . . Nor does any view expressed in my dissenting opinion in *Bell v. State of Maryland*, 378 U.S. 226, 318, 84 S.Ct. 1814, 1864, 12 L.Ed.2d 822, in which Mr. Justice Harlan and Mr. Justice White joined, affect this conclusion in the slightest for that opinion stated only that the Fourteenth Amendment in and of itself . . . does not bar racial discrimination in privately owned places of business in the absence of state action." (379 U.S. at 277-278 (Black, J. dissenting, emphasis added)).

Similarly, in this case, the decision in *Lloyd* that the First Amendment in and of itself does not bar shopping center owners from prohibiting access for expressive activity in the absence of state action, does not have the slightest bearing on the question as to whether a state may

compel access on the basis of state constitutional guarantees which do not require the presence of state action.

The power of the State of California to restrict the use and control of private property so as to provide access thereto by the public for a specific purpose is supported both by decisions of this Court, and by the traditional legal principles that empowers the states to impose reasonable restrictions over the use and control of private property.

In *Agricultural Labor Relations Board v. Superior Court*, (1976) 16 Cal.3d 392, 128 Cal.Rptr. 183, 546 P.2d 687, app. dism. for want of substantial federal question, 429 U.S. 802, the Supreme Court of California held that the use of private property may be restricted because of the public interest in collective bargaining, specifically noting that "all private property is held subject to the power of the government to regulate its use for the public welfare" (16 Cal.3d 392, 403). In that case where union organizers were granted access to private property under state law, this Court dismissed the appeal for lack of a substantial federal question.<sup>2</sup>

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<sup>2</sup>The absence of a substantial federal question in *ALRB v. Superior Court*, supra, clearly demonstrates that appellants' reliance on National Labor Relations Act cases, including, primarily, *NLRB v. Babcock and Wilcox Co.*, 351 U.S. 105 (1956), is misplaced. The appeal in *ALRB v. Superior Court*, supra, was taken precisely on the ground that the NLRA access cases set constitutional limits beyond which states may not go without infringing property owners rights (See, Jurisdictional Statement in *Kubo v. Agricultural Labor Relations Board*, No. 75-1734, 429 U.S. 802 (1976)). This Court's decision that no substantial federal question was presented in *ALRB* indicates that the *Babcock and Wilcox* line of cases do not purport to determine the constitutional limit to which Congress could go in assuring union access or to which the states may go in assuring access generally; rather, they simply construe the NLRA.



The power of the states to regulate the control of private property is further demonstrated by their ability to enjoin nuisances (Prosser, *Law of Torts*, 4th Ed. (West), "Nuisance", p. 603: "The power of a court of equity, in a proper case, to enjoin a nuisance is of long standing, and apparently never has been questioned since the earlier part of the eighteenth century."), to prohibit discriminatory denials of access into amusement parks, (*Orloff v. Los Angeles Turf Club*, 30 Cal.2d 110, 180 P.2d 321 (1947)), and to establish and enforce zoning regulations and other land use restrictions, (See, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974)).

Nor can it reasonably be said that the restriction herein imposed upon the use of private property by the State of California is clearly arbitrary or unreasonable, or that it bears no substantial relation to a legitimate state goal. In the decision below, the California Supreme Court found, on the basis of evidence in the record, that the establishment and expansive development of suburban shopping centers in California has resulted in the coinciding demise of the traditional public forums. (*Robins v. Pruneyard*, 23 Cal.3d 899, 907, 153 Cal.Rptr. 854, 858, 592 P.2d 341 (1979)).

It is also important to note, as did the California Supreme Court, that Appellees' conduct herein involved the circulation of petitions to the government for the redress of grievances:

"In assessing the significance of the growing importance of shopping centers we stress also that to pro-

hibit expressive activity in the centers would impinge upon constitutional rights beyond speech rights. Courts have long protected the right to petition as an essential attribute of governing. (*United States v. Cruikshank*, (1976) 92 U.S. 542, 552 [23 L.Ed. 588, 591].) The California Constitution declares that 'people have the right to . . . petition government for redress of grievances . . .' (Art. I, § 3). That right in California is, moreover, vital to a basic process in the state's constitutional scheme—direct initiation of change by the citizenry through initiative, referendum, and recall. (Cal.Const. Art. III, §§ 8, 9 and 13)" *Robins v. Pruneyard*, 23 Cal.3d 899, 907-908, 153 Cal.Rptr. 854, 858 (1979)

The California Supreme Court, in determining the importance of the state goal for which protection was sought, specifically referred to an amicus brief filed by the California Fair Political Practices Commission which urged that Court to grant the requested relief, pointing out that "because of the large number of signatures required to succeed in an initiative, referendum or recall drive, guaranteeing access to voters is essential to make meaningful the right to mount such a drive." *Robins v. Pruneyard*, 23 Cal.3d 899, 908, 153 Cal.Rptr. 854, 858-859 (footnote 4).

Having so recognized the need for the State to protect and guarantee the exercise of rights essential to the State's process of government, and having found that "[s]hopping centers to which the public is invited can provide an essential and invaluable forum for exercising those rights," (23 Cal.3d at 910, 153 Cal.Rptr. at 860), the California Supreme Court preserved and advanced a legitimate state goal by concluding the "Sections 2 and 3 of Article I of

the California Constitution protect speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned." (23 Cal.3d at 910, 153 Cal. Rptr. at 860).

Since the constitution does not prohibit the states from imposing reasonable restrictions upon the use and control of private property, and since the restriction imposed by the California Supreme Court is not arbitrary or unreasonable, and is substantially related to a legitimate state goal, the Fifth and Fourteenth Amendment contentions of Appellants do not raise a substantial federal question.

**B. Even if the Conduct Appellees Seek to Protect Is Substantially the Same As That For Which First Amendment Protection Has Been Sought Before in This Court, the Presence of Adequate and Independent State Grounds Preclude Review of the Federal Question**

Appellants contend that the determination of First Amendment limits in *Lloyd v. Tanner*, 407 U.S. 551 (1972), controls the resolution of this case, basing that contention upon their characterization of Appellee's conduct as being substantially similar to that involved in *Lloyd*. (Jurisdictional Statement, page 11.)

However, even if the rights sought to be protected were the same, which they are not, and even if the Supreme Court of California had relied also on the First Amendment, jurisdiction would not lie.

Where a case may have been decided upon two grounds, one federal, the other non-federal, this Court's first inquiry must be whether the non-federal ground is independent of

the federal ground and adequate to support the judgment. *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935).

Clearly, the Constitution of the State of California constitutes a body of law independent of any federal doctrine. And this Court has recognized that "[i]t is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions." *Minnesota v. National Tea Company*, 309 U.S. 551 (1940).

In this case, the California Supreme Court has interpreted the State Constitution as protecting Appellees' activities. On that non-federal basis, California has enjoined Appellant from prohibiting such activity.

By so interpreting the State Constitution, thereby obviating the state action constraint faced by this Court under the First Amendment (*Lloyd v. Tanner, supra*), California has taken the asserted federal question out of the case and posited the matter squarely and entirely on state grounds.

## II

**THE PROTECTION OF THE RIGHT OF PETITION AND INCIDENTAL SPEECH IN A PRIVATELY OWNED SHOPPING CENTER PURSUANT TO ADEQUATE AND INDEPENDENT STATE GROUNDS DOES NOT VIOLATE APPELLANTS' FIRST AMENDMENT RIGHTS**

Appellants' next assert jurisdiction upon a theory that their own First Amendment rights are violated in that they are required to allow members of the public to use their shopping center as a forum for the expression of ideas. Appellants contend that they have a right, under

the First Amendment, to withhold their property from any expressive use.

Upon examination, it appears that Appellants, recognizing the lack of substance contained in their primary argument (previously discussed herein), are attempting to bootstrap "negative" speech rights onto property rights. Appellants do not, and cannot, argue that they are being forced to say, espouse, or believe anything; nor is there anything in the record which would indicate that ideas expressed by Appellees or other members of the public would be attributed to Appellants by shopping center patrons.

Appellees respectfully submit that Appellants' "negative" First Amendment argument is nothing more than a reassertion of their primary argument of absolute control over private property, couched in different, but equally unsubstantial terms.

This secondary argument by Appellants is ostensibly based upon principles announced in *Wooley v. Maynard*, 430 U.S. 705 (1977); *Board of Education v. Barnette*, 319 U.S. 624 (1943); and *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). To extend the principles announced in those cases to the situation at hand would be torturous.

In *Wooley v. Maynard*, 430 U.S. 705 (1977), the issue presented is whether an individual could be compelled by the State of New Hampshire to display an ideological message on the license plate of his personal automobile. Clearly, where a state requires an individual to say something or to appear to say something, by mandating its dis-

play on his personal vehicle, the bounds of legitimate state control over property are overstepped. In such a situation, there is a distinct possibility that the idea may be attributed to the car owner as being his own. Furthermore, in *Wooley, supra*, there was no conceivable legitimate state goal which required or supported the State's regulation.

Here, the legitimate and compelling state objective of protecting the exercise of rights essential to the state's system of government by the people warrants protection of Appellees' activity in an "essential and invaluable forum." *Robins v. Pruneyard*, 23 Cal.3d 899, 910, 153 Cal. Rptr. 854, 860 (1979).

A final distinction between the situation in this matter and that in *Wooley*, deserves special emphasis. In *Wooley*, the State had created the medium of expression, i.e., the motto bearing license plate required for placement on the vehicle. In the instant case, however, the forum was not created by the State, it already existed as an inherent characteristic of the shopping center. California is not requiring Appellants to say or espouse any belief. Rather, the State is protecting the rights of the citizens by restricting Appellants' control over property which they have put to a forum-creating use—the interest of the State is one of guaranteeing access to an essential forum which happens to be, as is generally the case in suburban California, on private property. California's protection of fundamental expressive activity in preexisting forums is quite different from New Hampshire's unnecessary creation of "mobile billboards."



Appellants' reliance on *Board of Education v. Barnette*, 319 U.S. 624 (1943), is also misplaced. In *Barnette*, the issue is whether a state could compel a student to salute the flag and recite the "Pledge of Allegiance." In striking down that state regulation, this court held that "the action of local authorities in *compelling* the flag *salute* and *pledge* transcended constitutional limitations on their power and invades the sphere of intellect and spirit . . ." *Board of Education v. Barnette*, 319 U.S. at 642. (emphasis added)

Unlike the student in *Barnette*, Appellants are not required to speak, nor were they compelled to build the shopping center and thereby create a forum. But, having done so, they now argue that they have a right under the First Amendment to sterilize that forum, or devote it exclusively to their own views. That, Appellees submit, is not a question of Appellants' First Amendment rights, but one of land use. Appellants have been prohibited from using their land in a manner that is detrimental to the general welfare, and in a way that causes irreparable injury to the citizens of California, including Appellees, whose need to have access to that forum was found to outweigh Appellants' desire to control and/or sterilize it.

In both *Wooley, supra*, and *Barnette, supra*, the actual wrong in question was not the expression itself, but the invasion of the individual's privacy as to his thoughts, statements, and beliefs. It cannot reasonably be said that ideas passed between members of the public in a shopping mall generally open to the public, invade the privacy of Appellants' own intellect and spirit. There is nothing in the record which indicates that anyone did, or would, at-

tribute Appellees' beliefs to Appellants by virtue of their ownership of the shopping center. It is absurd to say that the citizens of California, knowing that they as individuals may circulate petitions in privately owned shopping centers, would think that such expressive activity is instigated, fostered or espoused by the landowner, simply by virtue of his status as such.

Appellants cite *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), for the proposition that government may not coerce speech where one desires not to speak. In *Tornillo*, this court struck down a state law requiring newspapers to publish replies of political candidates whom they criticize. Appellants fail to demonstrate the applicability of *Tornillo* to this case.

*Tornillo* involved what was essentially a penalty imposed upon newspapers for having said something in print. The newspaper was required to take affirmative action, i.e., to publish a response. Again, Appellants herein are not required to say anything, nor are they being penalized for having said anything.

The "forum" involved in *Tornillo*, the press, is simply not analogous to that herein. It is a unique institution which enjoys the protection of a specific constitutional guarantee, and a distinct body of constitutional law. Obviously, the forum of the press is separate and distinct from the forum of the community. The latter is to be found where the individuals of society gather on a day-to-day basis. It is the place where members of the public may exchange ideas.

*Tornillo, supra*, does not support the proposition that anyone has a First Amendment right to restrain access

to, or otherwise control the democratic exchange that takes place in the gathering places of the public. Nor does *Tornillo* support the contention that expression of beliefs by individuals within such a forum offends the First Amendment rights of an individual upon whose property the forum exists.

Finally, Appellees refer the court to *Marsh v. Alabama*, 326 U.S. 501 (1946), not as precedent for the right of access to Appellants' shopping center, but in support of the proposition that where access is properly mandated there is not a violation of the private landowner's First Amendment rights.

Both in *Marsh*, under the First Amendment, and in this case, under the adequate and independent state constitutional grounds, expressive activity by individuals is protected on what is clearly private property. Given that basic fact of protected access, the alleged First Amendment rights of Appellants herein would be the same as those possessed by the landowner in *Marsh*. Yet *Marsh*, which has been relied on by Appellants in other contexts throughout this litigation, does not make the slightest reference to the issue.

Appellees submit that if this issue had been raised in *Marsh*, the result would not have differed.

Admittedly, this reference to *Marsh* presses upon the court a negative inference. For that reason, Appellees do not consider *Marsh* to be a case of precedence on this issue, but rather an illuminating example fostered by this Court

as to the lack of substance behind Appellants' negative First Amendment argument.

Since the cases cited by Appellants do not support their proposition that the decision below infringes upon their First Amendment rights; since the record does not contain any evidence tending to show that Appellants are compelled to personally engage in any expressive activity, or that Appellees' activity could reasonably be attributed to Appellants; and since *Marsh v. Alabama*, 326 U.S. 501 (1946), allowed access to private property without restriction as to the First Amendment rights asserted by Appellants herein, it is respectfully submitted that Appellants do not by such argument raise a substantial federal question.

### CONCLUSION

California's ruling that the solicitation of signatures upon a petition to the government on the premises of a privately owned shopping center rests upon adequate and independent state grounds.

The states have the power to impose reasonable restrictions on the use and control of private property in order to protect fundamental rights guaranteed by state law, and to protect the general welfare of their residents.

The restriction imposed in this case does not compel expression by Appellants, nor does it invade the privacy of their own beliefs, or their right to express that which they choose.

The decision below affects Appellants' property in a manner that is not repugnant to the Constitution, and it does not adversely affect Appellants' First Amendment rights. Appellees, therefore, respectfully request that this appeal be dismissed in that no substantial federal question is presented.

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# In the Supreme Court

OF THE

## United States

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OCTOBER TERM, 1979

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**No. 79-289**

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PRUNEYARD SHOPPING CENTER, ET AL.,  
*Appellants,*

VS.

MICHAEL ROBINS, ET AL.,  
*Appellees.*

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**On Appeal From the Supreme Court  
of the State of California**

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### SUPPLEMENTAL MOTION TO DISMISS

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## SUPPLEMENTAL MOTION TO DISMISS

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In addition to their substantive arguments, appellants in their jurisdictional statement (at 11-12) offered a "conflict" on the property rights issue as a reason for granting plenary review. Appellees, in their Motion to Dismiss, inadvertently omitted their response to this argument. We do so now, so that our mistake does not mislead the Court into giving credence to the supposed conflict.

Simply put, the assertion that, in *Lenrich Associates v. Heyda*, 264 Or. 122, 504 P.2d 112 (Ore. 1972), the Oregon

Supreme Court "held . . . that the shopping mall owner's Fifth and Fourteenth Amendment property rights cannot be overcome by a state constitutional provision" (J. St. at 12) is erroneous. Only three of the six justices on that case joined the plurality opinion so stating. The remaining three justices either disagreed with that view\* or found it unnecessary to reach the issue. Further, since *Lenrich* was decided before *Hudgens v. NLRB*, 424 U.S. 507 (1976), even the plurality view on the meaning of *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1942) should have little vitality today. Thus, the California Supreme Court's decision on the Fourteenth Amendment question is not in conflict with the holding of the Oregon Supreme Court or, so far as we are aware, any other court.

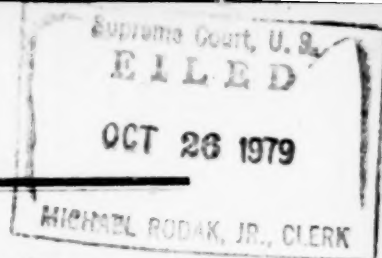
Respectfully submitted,

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\*Justice Denecke in particular recognized the severe alteration in basic, long-understood concepts that *Lloyd Corp.* would *sub silentio* have worked, if read as the *Lenrich* plurality maintained. The theory, he noted, would "greatly restrict the rights of states and their subdivisions to regulate the use of property" (504 P.2d, at 117). As an example of the kind of cases such a theory would affect, he gave an Oregon case upholding a zoning ordinance prohibiting automobile wrecking yards in certain locations. *Id.*





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**APPELLANTS' RESPONSE TO APPELLEES'  
MOTION TO DISMISS**

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**APPELLANTS' RESPONSE TO APPELLEES'  
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Appellees' motion to dismiss attempts to relitigate facts found against them by the trial court. In particular, appellees recite as part of their statement of the case that publicly owned areas are "inadequate for a petition project by reason of the scarcity of people to be found therein" and that appellees' "activity could not be effectively carried out on the public sidewalks of the center or elsewhere." Motion to Dismiss at 5. The trial court found to the contrary:

The county . . . has many shopping centers, public shopping and business areas, public buildings,

parks, stadia, universities, colleges, schools, post offices and similar public areas where large numbers of people congregate and where people can freely exercise First Amendment rights, including without limitation . . . seeking signatures on petitions.

\* \* \*

Plaintiffs only attempted to obtain signatures to their petition on private property, rather than in public areas whether nearby or otherwise.

\* \* \*

There are adequate, effective channels of communication for plaintiffs other than soliciting on the private property of the CENTER.

#### Appendix to Jurisdictional Statement at A-2, A-3.

Nor, as appellees assert, did the California Supreme Court "modify" the trial court's findings. Motion to Dismiss at 7. Rather, it simply ignored those findings, choosing instead to retreat to generalizations and statistics about shopping centers in San Jose and in our society generally. This Court's decision in *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), is a complete answer to the contention that such data warrant a restructuring of the respective rights of shopping center owners and would-be petitioners:

The essentially private character of a store and its privately owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center.

\* \* \*

There may be situations where accommodations between [the Fifth and Fourteenth Amendment rights of private property owners and the First

Amendment rights of all citizens] and drawing of lines to assure due process protection of both, are not easy. But on the facts presented in this case, the answer is clear.

407 U.S. at 569-70.

The motion to dismiss also dwells upon the argument that an adequate and independent state ground insulates a state court judgment from review in this Court. This self-evident principle has no part to play in the present case. The California Supreme Court premised the right of access on its revised interpretation of the state constitution, but it could not decide this case for appellees without also reaching and rejecting appellants' federal constitutional defenses.

Finally, the motion to dismiss mirrors the opinion of the California Supreme Court in its focus upon yet another irrelevancy—the role of initiative, referendum and recall procedures in California state government. Motion to Dismiss at 19. The petitioning sought to be conducted at Mr. Sahadi's shopping center involved Syrian emigration policy. It did not involve an initiative, referendum or recall; was not addressed to state officials; and did not concern state issues.

This is a case in which the California Supreme Court has created a doctrinal house of cards. Ignoring the facts as found by the trial court and ignoring the law as propounded in this Court's shopping center access cases, the court below has instead treated the case as if it involved some safety standard or zoning restriction.



If federal property rights of California shopping center owners must be balanced anew against a right of access, that balance should be struck by this Court.

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**On Appeal From the Supreme Court  
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**BRIEF OF APPELLANTS**

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On Appeal From the Supreme Court  
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**BRIEF OF APPELLANTS**

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**OPINIONS BELOW**

The findings of fact, conclusions of law and judgment of the Superior Court, J.S. App. A, and the opinion of the District Court of Appeal, J.S. App. B, are not reported. The opinion of the Supreme Court of the State of California, J.S. App. C, is reported at 23 Cal. 3d 899, 153 Cal. Rptr. 854, 592 P.2d 341 (1979).

**JURISDICTION**

The decision of the Supreme Court of the State of California was filed on March 30, 1979. A timely petition for rehearing was filed. This was denied on May 23, 1979, and the judgment became final. J.S. App. D.

Appellants filed a notice of appeal to this Court in the Supreme Court of the State of California on May 30, 1979. J.S. App. E. The jurisdictional statement was filed on August 21, 1979, within 90 days from the denial of rehearing below. On November 13, 1979, this Court ordered that "further consideration of the question of jurisdiction is postponed until the hearing of the case on the merits." A. 68. As more fully discussed at pp. 7-9 of this brief, the jurisdiction of this Court rests upon 28 U.S.C. § 1257(2) or, in the alternative, upon 28 U.S.C. § 1257(3).

#### CONSTITUTIONAL PROVISIONS AND STATUTES

##### First Amendment, United States Constitution:

Congress shall make no law . . . abridging the freedom of speech. . . .

##### Fifth Amendment, United States Constitution:

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

##### Fourteenth Amendment, Section 1, United State Constitution:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

##### 28 U.S.C. § 1257. State courts; appeal; certiorari:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

\* \* \*

- (2) By appeal, where is drawn in question the validity of a statute of any state on the

ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

- (3) By writ of certiorari . . . where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of . . . the United States.

##### Article I, Section 2, California Constitution:

Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

##### Article I, Section 3, California Constitution:

[P]eople have the right to . . . petition government for redress of grievances.

#### QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to review the judgment below.

2. Whether the owner of a private shopping center that is not the functional equivalent of a municipality has rights under the First, Fifth and Fourteenth Amendments of the United States Constitution to prohibit non-business related petitioning on the premises of the center, when the persons who wish to engage in such petitioning have other adequate and effective channels of communication in the area.



## STATEMENT

Appellant PruneYard Shopping Center ("PruneYard" or "Center") is a privately owned shopping center located in Santa Clara County, California, occupying approximately 21 acres and containing 65 shops, 10 restaurants and a cinema. A. 13-14. Public sidewalks and streets border the Center on two sides. A. 46-47. The Center had a policy prohibiting all handbilling and circulation of petitions. J.S. App. A-2. Appellant Fred Sahadi is the owner of the Center. J.S. App. A-1.

On November 16, 1975, appellees set up a table in the central courtyard of the Center and solicited signatures in support of petitions condemning Syria for refusing to allow Jews to leave the country and condemning a United Nations resolution on Zionism. A. 20-21. Security guards employed by the Center, after informing appellees that their conduct violated the Center's policy, requested them to leave and pointed out that they could resume their efforts on the public sidewalks adjoining the Center. Appellees left the Center, but did not attempt to solicit signatures in any public places. A. 27.

Appellees brought this action seeking an injunction against enforcement of the Center's policy. After a full evidentiary hearing, the Superior Court concluded that "[t]here has been no dedication of [the Center's] property to public use"; that the Center "is not the functional equivalent of a municipality"; that the appellees' petitions are "unrelated to the activities" of the Center; and that there are "adequate, effective channels of communication for [appellees] other than soliciting on the private property" of the Center. J.S. App. A-2, A-3. The Superior Court accordingly denied an injunction, and the District Court of Appeal affirmed.

On appeal in the Supreme Court of the State of California, the Center owner urged affirmance on the grounds, *inter alia*, that his "property rights are protected by the federal Constitution"<sup>1</sup> and that his "free speech rights under both the federal and state constitutions would be infringed if [he] were required to utilize his private property in support of plaintiffs' expressive activity."<sup>2</sup> In a four-to-three decision, that court reversed, holding that "sections 2 and 3 of article I of the California Constitution protect speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned." J.S. App. C-12; 23 Cal. 3d at 910.<sup>3</sup>

## SUMMARY OF ARGUMENT

This Court has jurisdiction, on appeal under 28 U.S.C. § 1257(2) or on certiorari under 28 U.S.C. § 1257(3), to review the judgment of a state's highest court when that judgment has upheld the validity of a state law over a claim that the state law is invalid on federal grounds. This is precisely such a case.

The decision of the California Supreme Court interpreted certain provisions of the California Constitution as creating a right to petition in privately owned

<sup>1</sup> Brief in Response to Amicus Curiae Briefs at 27 (emphasis deleted). This was appellants' principal brief in the California Supreme Court.

<sup>2</sup> Brief in Response to Amicus Curiae Briefs at 35 (emphasis deleted).

<sup>3</sup> On June 12, 1979, Mr. Justice Rehnquist denied appellants' application for a stay with the notation "Denied. No irreparable injury." The Superior Court entered an injunction on June 21, 1979.



shopping centers over the objection of the owner of the shopping center. In so doing, the court rejected the owner's contention that the California Constitution, as so interpreted, infringed his rights of property and free speech under the United States Constitution.

This is not a case in which an adequate and independent state ground of decision insulates a state court judgment from review in this Court. The California Supreme Court premised its decision on a newly found interpretation of the free speech and petitioning provisions of the California Constitution. However, the ground of decision below was not "independent" of the federal constitutional defenses raised by the Center and its owner since the California Supreme Court could not and did not decide this case for appellees without also reaching and rejecting those federal defenses.

In compelling the shopping center owner to make his property available as a forum for petitioning, the California Supreme Court failed to balance the shopping center owner's rights protected by the First, Fifth and Fourteenth Amendments of the United States Constitution against the state-created right to enter upon the property to solicit petition signatures from shopping center patrons. This Court's decision in *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), requires that such a balance be struck before a state may constitutionally require access to private property for speech purposes.

This Court in *Lloyd* defined the inquiry which must be made when that balance between federally protected property rights and any free speech right, whether federal or state, is struck: do those asserting a free speech right have an "adequate alternative avenue . . . of communication" available for the expression of their

views that does not impinge on the property owner's federal constitutional rights? 407 U.S. at 567. If so, the free speech rights of the public, whether under the First Amendment or under a state constitution, must yield to the property owner's federal constitutional rights. Here, the trial court specifically found that appellees had other adequate, effective avenues of communication. Under these circumstances, this Court should reverse the judgment of the California Supreme Court.

### ARGUMENT

#### I. THIS COURT HAS JURISDICTION UNDER 28 U.S.C. § 1257(2)

The jurisdiction of this Court to hear the present appeal is conferred by 28 U.S.C. § 1257(2), which vests this Court with appellate jurisdiction over the judgment of the highest court of any state

where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution . . . of the United States, and the decision is in favor of its validity.

In this case, the highest court of the State of California held that the free speech and petitioning provisions of the California Constitution include a right of access to shopping centers. It is well established that a state constitutional provision is a "statute" within the meaning of § 1257(2). *Torcaso v. Watkins*, 367 U.S. 488 (1961); *Adamson v. California*, 332 U.S. 46, 48 n.2 (1947); *Railway Express Agency v. Virginia*, 282 U.S. 440 (1931). That the validity of the state constitutional provisions—as so interpreted—was drawn in question on the ground of their being repugnant to the United States Constitution is clear from the opinion below. One of two "main questions" before it, stated

the California Supreme Court, was whether "*Lloyd v. Tanner* . . . recognize[d] federally protected property rights of such a nature that we are now barred from ruling that the California Constitution creates broader speech rights as to private property than does the federal Constitution." J.S. App. C-2. The court below held that *Lloyd* did not preclude its novel interpretation of the state constitution's free speech and petitioning provisions. Its holding establishes this Court's appellate jurisdiction:

Where it appears from the opinion of the state court of last resort that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the court was in favor of its validity, we have jurisdiction on appeal.

*Charleston Federal Savings and Loan Ass'n v. Alderson*, 324 U.S. 182, 185-86 (1945).

Alternatively, this Court has jurisdiction over the present case on writ of certiorari, as a case "where [a] right [was] . . . specifically set up or claimed under the Constitution of the United States." 28 U.S.C. § 1257 (3). As the foregoing discussion makes clear, the Center and its owner specifically claimed a right under the United States Constitution to exclude appellees.

Nor is this a case in which an adequate and independent state ground of decision defeats this Court's jurisdiction. The court below was required to determine on the merits whether the shopping center owner's federal constitutional rights supersede a right of access grounded on the free speech and petitioning provisions of the state constitution. Because this is a case in which "decision of the federal question was necessary to the judgment rendered" below, *Herb v. Pitcairn*, 324 U.S. 117, 131 (1945), the decision of the California

Supreme Court is not supported by an adequate and independent state ground.

**II. THE FEDERAL FIRST, FIFTH AND FOURTEENTH AMENDMENT RIGHTS OF A SHOPPING CENTER OWNER ARE SUPERIOR TO THE STATE LAW RIGHT OF ACCESS CREATED BY THE CALIFORNIA SUPREME COURT**

**A. The decisions of this Court establish that the owners of shopping centers, in common with the owners of other private property, have a paramount federal right to control the use of their property for speech purposes.**

In *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), this Court was squarely presented with the question of

the right of a privately owned shopping center to prohibit the distribution of handbills on its property when the handbilling is unrelated to the shopping center's operations.

407 U.S. at 552. That question was answered in favor of the shopping center owner on constitutional grounds controlling here.

In *Lloyd*, this Court addressed "petitioner's contention that the decision below [in favor of the citizen activists] violate[d] rights of private property protected by the Fifth and Fourteenth Amendments." 407 U.S. at 552-53. *Lloyd* held both that the actions of the shopping center owner at issue did not rise to the level of state action because the shopping center in that case was not the "functional equivalent of a municipality", and that federally protected property rights of the owners were paramount under the circumstances presented there. The Court explained:

It would be an unwarranted infringement of property rights to require them to yield to the exercise



of First Amendment rights under circumstances where adequate alternative avenues of communication exist. Such an accommodation would diminish property rights without significantly enhancing the asserted right of free speech.

407 U.S. at 567. The Court further admonished that "the Fifth and Fourteenth Amendment rights of property owners . . . must be respected and protected." 407 U.S. at 570.

Because of the importance of federally protected property rights, *Lloyd* requires asserted speech rights to yield to them whenever adequate alternative avenues of communication are available. The constitutional stature of the rights of property owners in controversies over access to private property was recognized as long ago as *Marsh v. Alabama*, 326 U.S. 501 (1946), where Justice Black for the Court noted the necessity of "balanc[ing] the Constitutional rights of owners of property against those of the people to enjoy" First Amendment rights. 326 U.S. at 509. And in *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972), the Court held that the mere opening of a private parking lot to the public does not transform it into the equivalent of a municipal lot, because such a ruling would be an "unwarranted infringement of long-settled rights of private property protected by the Fifth and Fourteenth Amendments." 407 U.S. at 547.

The rights of a property owner to prohibit or control petitioning on his private property are rooted in the Fifth Amendment guarantee against the taking of property without just compensation and are incorporated in the Fourteenth Amendment guarantee against the deprivation of property without due process of law. *Lloyd Corp. v. Tanner*, 407 U.S. at 567. The principles

developed by this Court in condemnation and inverse condemnation cases are relevant in the present context as well, because they reflect the fundamental conception of private property ownership protected by the Constitution. The right to exclude those who would use the property in violation of the owner's desires is one such fundamental property right.

The Court has traditionally respected the right of a householder to bar, by order or notice, solicitors, hawkers and peddlers from his property. *See Martin v. City of Struthers* [319 U.S. 141, 147 (1943)]; *cf. Hall v. Commonwealth*, 188 Va. 72, 49 S.E.2d 369, appeal dismissed, 335 U.S. 875 (1948).

*Rowan v. Post Office Dep't*, 397 U.S. 728, 738 (1970). In *Delaware, L. & W. R. Co. v. Town of Morristown*, 276 U.S. 182 (1928), the Court held that a city could not, under the guise of the police power, force a common carrier to admit taxicabs to a privately owned railroad station without paying compensation. The lower court was directed to enjoin the enforcement of the ordinance under which the city had acted.

Just this term, the Court reaffirmed that "the 'right to exclude', so universally held to be a fundamental element of the property right, falls within [the] category of interests that the Government cannot take without compensation." *Kaiser Aetna v. United States*, 48 U.S.L.W. 4045, 4049 (Dec. 4, 1979) (footnotes omitted).<sup>4</sup> *Kaiser Aetna* recognizes that the "right to

<sup>4</sup> See also *United States v. Causby*, 328 U.S. 256 (1946) (physical "invasion" of land by airplanes compensable); *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922) (invasion by noise compensable). Although this is not a condemnation case, the right to exclude is an incident of the property rights protected by the due process clause from state regulation that serves no end superior to the property right. As Justice Stevens

exclude" is such a central element of private property that the government, even in the name of reasonable regulation, cannot diminish that right without paying compensation.

The constitutional rights of private property owners also have their origins in the First Amendment right of the property owner not to be forced by the state to use his property as a forum for the speech of others.

In *Wooley v. Maynard*, 430 U.S. 705 (1977), this Court was faced with "the question of whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public." 430 U.S. at 713. The answer was direct: "We hold that the State may not do so." *Id.* In explaining its decision, the Court adverted to a core principle of our democratic order incorporated in the First Amendment:

We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking. . . . A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of individual "freedom of mind."

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noted in concurrence in *Moore v. City of East Cleveland*, 431 U.S. 494, 520 (1977), the due process clause protects against state action, unsupported by an overriding state interest, which "cut[s] . . . deeply into a fundamental right normally associated with the ownership of residential property."

430 U.S. at 714 (citations omitted). The right to be silent reaffirmed in *Wooley* has led the Court to strike down state laws requiring students to salute and pledge allegiance to the flag, *Board of Education v. Barnette*, 319 U.S. 624 (1943), and requiring newspapers to publish replies of political candidates whom they criticize, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), as well as the law invalidated in *Wooley* prohibiting automobile owners from obscuring a state motto, "Live Free or Die," on their license plates. *Wooley v. Maynard, supra*.

The property owner's right to remain silent cannot be defeated by arguing that the decision below does not "force" appellant to "say, espouse or believe anything."<sup>5</sup> A state court injunction ordering appellant to admit speakers onto his property or suffer the penalty of contempt is as coercive a state directive to furnish one's property as a forum for the speech of another as was the New Hampshire law at issue in *Wooley* compelling display of a motto on the license plate required to operate a car. Moreover, it makes no difference that appellant here chose to use his property as a shopping center, thereby, as appellees would have it, voluntarily exposing himself to the risk of such compulsion; in *Wooley*, the protesting driver could have avoided state compulsion to use his car as a forum by foregoing the purchase of an automobile. In both cases, once the property was purchased, the owner acquired the right not to be compelled by the state to use that private property as a forum for the views of others.

Nor is it persuasive to argue that *Wooley* is inapposite because the patrons of the shopping center may not attribute to Mr. Sahadi the views espoused

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<sup>5</sup> Motion to Dismiss at 22.



by appellees.<sup>6</sup> This argument simply misreads the nature of the right to refrain from speaking. The driver in *Wooley* could easily have dissociated himself from the New Hampshire motto by placing a bumper sticker with a contrary message on his car. The lesson of *Wooley* is not that the car owner was forced to display a message with which he disagreed; it is that the state forced him to display any message at all.

Had the New Hampshire law instead required only those who espoused the philosophy expressed in the pungent motto "live free or die" to display that motto on their license plates, while exempting those who opposed the sentiment or had no opinion, that law would equally have been inconsistent with the right to refrain from speaking. Such a law would have compelled those who supported the sentiment to use their property as a "moving billboard." *Wooley v. Maynard, supra*, 430 U.S. at 715. State-compelled speech, even speech in which the speaker might believe, offends the First Amendment right "to decline to foster" speech and to "refrain from speaking." 430 U.S. at 714. Here, it does not matter whether Mr. Sahadi supports Zionism or opposes it. It does not matter whether patrons of the Center attribute the sentiments of the appellees to Mr. Sahadi or believe that he opposes those sentiments. What does matter is that Mr. Sahadi is being forced by the state to use his private property as a forum for the expression of views, and that he is deprived of the choice guaranteed him by the First Amendment to remain silent or indifferent.

The right of the property owner to control the use of his private property thus has its origins in the First,

<sup>6</sup> Motion to Dismiss at 22.

Fifth and Fourteenth Amendments. Decisions of this Court have vindicated that right over First Amendment challenges in the precise context of political speech at shopping centers. Although a state court is ordinarily free to interpret the provisions of a state constitution to create rights beyond those afforded by the United States Constitution, it may not in so doing infringe upon the federal constitutional rights of others. *Reitman v. Mulkey*, 387 U.S. 369 (1967). In an earlier decision, the California Supreme Court recognized this fundamental principle:

Under the holding of the *Lloyd* case, the due process clause of the United States Constitution protects the property interests of the shopping center owner from infringement. . . . Even were we to hold that the state Constitution in some manner affords broader protection than the First Amendment of the United States Constitution . . . nevertheless supremacy principles would prevent us from employing state constitutional provisions to defeat defendant's federal constitutional rights.

*Diamond v. Bland*, 11 Cal. 3d 331, 335 n.4, 113 Cal. Rptr. 468, 471 n.4, 521 P.2d 460, 463 n.4 (citations omitted), *cert. denied*, 419 U.S. 885 (1974).<sup>7</sup>

In the present case, the court below overruled *Diamond v. Bland* and held that the California Constitution can, and does, require shopping center owners to allow unrelated speech and petitioning. Its new-found

<sup>7</sup> The Oregon Supreme Court has also denied access on the grounds that to order entry upon private land in the name of a state free speech right would be contrary to the controlling authority of *Lloyd*. *Lenrich Associates v. Heyda*, 264 Or. 122, 504 P.2d 112 (1972) (plurality opinion).

analysis concludes with a suggestion that the shopping center in *Lloyd* was somehow a special case:

The court in *Lloyd* examined the functions performed by Lloyd's center but did not purport to define the nature or scope of Fifth and Fourteenth Amendment rights of shopping center owners generally.

J.S. App. C-4, 23 Cal. 3d at 904.

Nothing in the *Lloyd* opinion or in subsequent decisions supports the notion that this Court intended to limit *Lloyd* to its facts, nor does the opinion below identify any salient differences between Lloyd Center and PruneYard. In fact, both are large centers located on private property; in both cases the speech activity was unrelated to the business of the center; and in both cases there were adequate alternative sites available to solicit signatures on petitions or to distribute handbills.

The California Supreme Court exceeded its authority when it rejected controlling precedent. As Justice Richardson for the dissenters emphasized, the decision below cannot be squared with *Lloyd*:

The *Lloyd* rationale is applicable and unanswerable. The majority may not evade it by resort, in this instance, to the California Constitution, which must yield to a paramount federal constitutional imperative.

J.S. App. C-20, 23 Cal. 3d at 916.

**B. When adequate alternative channels of communication are available, the federal constitutional rights of shopping center owners outweigh any state-created right of access.**

The California Supreme Court, disregarding the controlling precedents, launched upon an unstructured discussion of the importance of the state interest, created

by the state constitution, in fostering speech.<sup>8</sup> To support its apparent view that property rights must yield to any conceivable state interest, J.S. App. C-6, 23 Cal. 3d at 906, the opinion below recites a number of permissible types of property regulation, such as zoning and environmental restrictions. This sketchy analysis is entirely unpersuasive. State regulation of property to promote orderly development, to ensure safety, or to protect public health or the environment is premised on the police power and involves interests far different from those involved in the present case.

This is a case involving, on the one hand, the interest of appellees in utilizing the property of the shopping center owner to convert others to their cause and, on the other hand, the interest of the shopping center's owner in controlling the use of his property. These are precisely the conflicting interests which were before this Court in *Lloyd*. Accordingly, if a balancing or accommodation of interests is required or appropriate in a clash between an asserted state law right to use private property for petitioning and the federal rights of the owner to be free from such interference, the court below had to take its guidance from that case.

<sup>8</sup> The California Supreme Court premised its creation of the right to access on the free speech and petitioning clauses of the California Constitution (article I, sections 2 and 3). The court also drew support for the result it reached from the right protected by state law to engage in initiative, referendum and recall drives as one other source of this right of access (Cal. Const., article II, sections 8, 9 and 13). J.S. App. C-9. The direct democracy provisions of the California Constitution are wholly irrelevant to this case. The petitioning sought to be conducted at the PruneYard criticized Syrian emigration policy and a United Nations resolution. It did not involve an initiative, referendum, or recall; was not addressed to any state official; and did not concern state issues.



*Lloyd* requires that the speech interests of the citizen must yield to the competing interests of the property owner so long as the citizens have adequate alternative avenues to express their messages. As this Court held,

*It would be an unwarranted infringement of property rights to require them to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist. Such an accommodation would diminish property rights without significantly enhancing the asserted right of free speech.*

407 U.S. at 567 (emphasis supplied).

*Lloyd* requires that an accommodation between the competing constitutional rights of citizens and property be struck whenever these rights are in conflict, and identifies the only circumstances under which that balance may tilt in favor of a would-be petitioner: namely, when to deny access would be to deny the petitioner an adequate forum for expression of his views.<sup>9</sup>

This method of accommodating conflicting interests was adapted from the method used by this Court in the analogous context of labor union access to employer property. A series of decisions has fleshed out accommodations under varying circumstances between the right of the employer to determine how his property shall be used and the statutory rights of employees to organize

<sup>9</sup> This process of accommodating free speech rights with other competing rights and interests is a familiar one in constitutional law. See, e.g., *Procunier v. Martinez*, 416 U.S. 396 (1974) (speech rights of prisoners must yield to accommodate need for prison discipline).

and to bargain collectively.<sup>10</sup> As explained in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), “[a]ccommodation [between organization rights and property rights] must be obtained with as little destruction of one as is consistent with maintenance of the other.” 351 U.S. at 112. For example, decisions of this Court allow employers to bar nonemployee organizers except when the organizers can demonstrate that “the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels.” *NLRB v. Babcock & Wilcox Co.*, 351 U.S. at 112. Moreover, organizational picketing on employer property can be conducted over the employer’s objection only during an organizational campaign. *Central Hardware Co. v. NLRB*, 407 U.S. at 545-46. Thus, even in the interpretation of the National Labor Relations Act, which expresses the strong national policy of “promot[ing] the peaceful settlement of industrial disputes,” *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 211 (1964), property rights have been forced to yield only under carefully limited circumstances and then only temporarily.

In the context of constitutional rights, *Lloyd* strikes the balance this Court found so necessary in *Babcock & Wilcox*, ensuring that the accommodation between competing rights will occur with “as little destruction of one [right] as is consistent with the maintenance of the other.” *NLRB v. Babcock & Wilcox*, *supra*, at 112. Under this balancing test, free speech rights prevail over the constitutional rights of private property

<sup>10</sup> See, e.g., *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956); *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972); *Hudgens v. NLRB*, 424 U.S. 57 (1976); *Eastex v. NLRB*, 437 U.S. 556 (1978).



owners only if the denial of access to private property would effectively silence the speaker. The accommodation reached in *Lloyd* does not defeat the speaker's right to be heard, nor the property rights of the owner. The speaker may be relegated to a forum he would not otherwise choose as the outlet for his message. But there is no constitutional right to speak from what the speaker considers the best available soapbox. *See generally Adderly v. Florida*, 385 U.S. 39 (1966) (state may in pursuit of legitimate state interest close even some state-created forums); *Greer v. Spock*, 424 U.S. 828 (1976) (same result).

Of course, the outcome of this required balancing process will always depend on the availability of alternative forums for the speaker. *Lloyd* itself recognized that there may be situations where the accommodation of rights is "not easy." 407 U.S. at 570. Not all shopping centers are alike. Many are mammoth regional centers, like the shopping center in *Lloyd* or rural outposts drawing shoppers from a multi-county area. Shopping centers in downtown areas may be located in two-tier arcades of giant office buildings or in enclosed malls surrounded by bustling public spaces. Some shopping centers may be no more than collections of "Mom and Pop" stores serving small neighborhoods. A number of shopping centers, like the PruneYard itself, are medium-sized groupings of specialty stores serving the needs of suburban residents who drive to the center. While there may conceivably be circumstances under which coerced use of a shopping center as a forum might be constitutional, this is certainly not such a case. For here, as in *Lloyd*, the outcome of the balancing process "on the facts presented in this case" is "clear." 407 U.S. at 570.

The trial court heard all of the evidence and found that the appellees had alternative avenues of communication available that were both adequate and effective. J.S. App. A-3. The court found as a fact that "[t]he county in which the Center is located has many shopping centers, public shopping and business areas, public buildings, parks, stadia, universities, colleges, schools, post offices and similar public areas where large numbers of people congregate and where people can freely exercise First Amendment rights." J.S. App. A-2. Indeed, a Center guard advised appellees that they were free to petition on the public sidewalks outside the PruneYard itself. A. 27. Instead, when appellees were denied access to what they saw as the most convenient forum, they chose to litigate rather than use reasonable alternative public forums. Under *Lloyd*, however, they were not entitled to insist on the most convenient forum. So long as a citizen may adequately speak or petition without entering upon private property, he must rest content with the alternative available forums.

Ignoring controlling precedent, the California Supreme Court sacrificed Mr. Sahadi's constitutional rights on the altar of its own notion of public policy. That is not a sacrifice permitted by the United States Constitution. If Mr. Sahadi could not be forced to sign a petition condemning Syria, under *Lloyd* he cannot be required to devote his private property to appellees' cause, since adequate alternative sites for petitioning are available. Mr. Sahadi's federally protected rights of speech and property compel that result. The contrary decision of the California Supreme Court is in blatant disregard of the supremacy clause and must be reversed.

**CONCLUSION**

The judgment of the Supreme Court of the State of California should be reversed.

Respectfully submitted,

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# In the Supreme Court

OF THE  
United States

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OCTOBER TERM, 1979

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No. 79-289

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PRUNEYARD SHOPPING CENTER, ET AL.,  
*Appellants,*

VS.

MICHAEL ROBINS, ET AL.,  
*Appellees.*

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On Appeal from the Supreme Court  
of the State of California

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## BRIEF OF APPELLEES

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### I

<p>There is no adequate basis upon which the court may take jurisdiction over this matter. The federal system of our government allows and encourages the states to resolve their peculiar problems under state law. This court's prior decisions concerning expressive activity in shopping centers withheld federal protection under the first amendment, but no decision has undermined the states' power to regulate such property to protect fundamental state rights. The matter before the court was decided on adequate and independent state grounds, and no substantial federal question has been raised</p>	14
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C. Winston Borgen, Learning Experience in Retailing (Pacific Palisades, Ca.), 1976, p. 55 .....	48, 51
David J. Rachman, Retail Strategy and Structure (Edgewood Cliffs, N.J.; Prentice Hall) 1975, p. 75 .....	48
Eric Peterson, "Shopping Centers: The Role Centers Must Play." Shopping Center World, July 1976, p. 10 .....	48, 54, 55
Eugene J. Kelley, Shopping Centers: Locating Controlled Regional Centers (Saugatuck, Conn.: The ENO Foundation for Highway Traffic Control), 1956, p. 2 .....	48, 49
Gurney Breckenfeld, "Downtown Has Fled to the Suburbs," Fortune, October, 1972, pp. 80-82 .....	47, 48, 49, 51, 55
"How Shopping Malls Are Changing Life in the U.S.," U.S. News and World Report, June 18, 1973, p. 43 .....	48, 51
"Important Facts About Shopping Centers—Main Street, U.S.A.," International Council of Shopping Centers Newsletter, January, 1975, No. 3 .....	48, 54, 55, 56
James Simmons, The Changing Pattern of Retail Location, University of Chicago, Department of Geography, Research Paper No. 92, 1964, p. 147 .....	46, 47
Neil Harris, "American Space: Spaced Out of the Shopping Center," The New Republic, December 13, 1975, p. 23 .....	48, 56
"Right Now", McCalls, January 1973, p. 61 .....	48
Rose DeWolf, "Shopping Centers: Main Street Goes Private," The Nation, December 18, 1972, p. 626 .....	51, 57, 59
San Francisco Chronicle, June 28, 1976, p. 1 .....	49, 50
"Shopping Centers Grow Into Shopping Cities," Business Week, September 4, 1971, p. 36 .....	49
Thomas Muller, "Urban Growth and Decline," Challenge, May-June, 1976, pp. 10-11 .....	46



# In the Supreme Court

OF THE

United States

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OCTOBER TERM, 1979

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No. 79-289

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PRUNEYARD SHOPPING CENTER, ET AL.,

*Appellants,*

vs.

MICHAEL ROBINS, ET AL.,

*Appellees.*

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On Appeal from the Supreme Court  
of the State of California

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**BRIEF OF APPELLEES**

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## **OPINION BELOW**

The opinion of the Supreme Court of the State of California is reported at 23 Cal.3d 899, 153 Cal.Rptr. 854, 592 Pac.2d 341 (1979), and was reprinted in Appellants' Jurisdictional Statement herein as Appendix C.

## **JURISDICTION**

The decision of the California Supreme Court was filed on March 30, 1979. A petition for rehearing was filed and denied. The judgment became final on May 23, 1979.

Appellants filed a notice of appeal to this Court in the California Supreme Court on May 30, 1979. A jurisdictional statement was filed on August 21, 1979, and appellees filed a timely motion to dismiss.

Probable jurisdiction has not been noted. According to this Court's order of November 13, 1979, "[f]urther consideration of the question of jurisdiction is postponed to the hearing of the case on the merits." (App. 68)

This brief first addresses the question of jurisdiction by demonstrating that the decision below rests on adequate and independent state grounds, is not repugnant to any federal right in issue, and that no substantial federal question is before the Court.

### **CONSTITUTIONAL PROVISIONS AND STATUTES**

#### **First Amendment, United States Constitution:**

Congress shall make no law . . . abridging the freedom of speech . . .

#### **Fifth Amendment, United States Constitution:**

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

#### **Tenth Amendment, United States Constitution:**

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

#### **Fourteenth Amendment, United States Constitution:**

[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .

#### **Article I, Section 2, California Constitution:**

Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

#### **Article I, Section 3, California Constitution:**

The people have the right to instruct their representatives, petition the government for the redress of grievances, and assemble freely to consult for the common good.

#### **Article II, Section 8, California Constitution:**

##### *Initiative*

(a) The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them.

(b) An initiative measure may be proposed by presenting to the Secretary of State a petition that sets forth the text of the proposed statute or amendment to the Constitution and is certified to have been signed by electors equal in number to 5 percent in the case of a statute, and 8 percent in the case of an amendment to the Constitution, of the votes for all candidates for Governor at the last gubernatorial election . . .

Article II, Section 9, California Constitution:

*Referendum*

(a) The referendum is the power of the electors to approve or reject statutes or parts of statutes except urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the State.

(b) The referendum measure may be proposed by presenting to the Secretary of State, within 90 days after the enactment date of the statute, a petition certified to have been signed by electors equal in number to five percent of the votes for all candidates for Governor at the last gubernatorial election, asking that the statute or part of it be submitted to the electors . . .

Article II, Section 14, California Constitution:

*Recall Petitions*

(a) Recall of a State officer is initiated by delivering to the Secretary of State a petition alleging reason for recall. . . . Proponents have 160 days to file signed petitions.

(b) A petition to recall a statewide officer must be signed by electors equal in number to 12 percent of the last vote for the office, with signatures from each of five counties equal in number to 1 percent of the last vote for the office in the county. Signatures to recall Senators, members of the assembly, members of the Board of Equalization, and judges of courts of appeal and trial courts must equal in number 20 percent of the last vote for the office. . . .

**QUESTIONS PRESENTED**

1. (a) The principal question before the Court is whether *Lloyd v. Tanner* (1972) 407 U.S. 551, recognized a paramount property right of shopping center owners whereby their power to prohibit expressive activity on their property may not be restricted by the states under state law.

(b) Does this Court's decision in *Hudgens v. NLRB* (1976) 424 U.S. 507, that shopping center owners' rights are dependent exclusively on the National Labor Relations Act so foreclose the principal question that it lacks sufficient substance to warrant review herein?

2. (a) May the State of California, under the State Constitution, protect rights of speech and petition in privately owned shopping centers where such centers are found to be essential and invaluable forums for the exercise of those rights, and where such protection is necessary to prevent irreparable injury to the petitioners and the general public?

(b) Does that decision in this case rest upon adequate and independent state grounds?

3. May this Court review issues raised by appellants concerning the Takings Clause and appellants' First Amendment rights, where there has been absolutely no showing made that such questions were properly and adequately raised in the State Court?

4. Does a restriction on a property owner's ability to control the protected conduct of a person permissibly on his property constitute a taking where the protected con-



duct has substantial public value and the restriction does not diminish the value of the property or interfere with its use?

5. By invoking the State Constitution to protect the right of individuals to solicit signatures on petitions to the government upon the premises of a privately owned shopping center, has the State of California adversely affected the landowner's First Amendment rights?

6. May shopping centers in California, where they are *the* centers of suburban communities, be characterized as forums in law since they are forums in fact?

#### STATEMENT OF THE CASE

On November 16, 1975, a group of students of the 1976 confirmation class of Temple Emanu-El, located in San Jose, California, went to the Pruneyard shopping center where they spoke with members of their community concerning a United Nations resolution labeling Zionism as a form of racism, and concerning the persecution of Jews in Syria. (A. 7) The students had drafted petitions, directed to the President of the United States and members of Congress, which set forth their grievances as to those situations. (A. 21)

Having set up a card table in one corner of the Pruneyard's central courtyard, the students began to collect the signatures of passersby. (A. 23) The project was well received by shopping center patrons. The students had a self-imposed rule that they would not harass people at the shopping center or block entrances to stores. Their conduct was at all times courteous and orderly. (A. 21-22)

After five to ten minutes, the students were advised by security personnel of the shopping center that their conduct was prohibited by shopping center regulations. The students were asked to leave, and did so. (A. 23)

The group that was excluded from the Pruneyard included Michael Robins, Ira David Marcus, and their confirmation class teacher, Roberta Bell-Kligler, who are the Appellees herein. (A. 7) For purposes of identification, these individuals are referred to herein as "the students."

Members of the confirmation class were all of high school age. (A. 20) School was then in session, and participation in the petition project was necessarily restricted to weekends. (A. 21) From prior experience, the students knew that publicly owned areas of downtown San Jose and neighboring municipalities were inadequate for a petition project because of the scarcity of people in such areas. (A. 22)

A petition project, unlike handbilling, leafleting, and picketing, could not be effectively carried out on the public sidewalks surrounding the shopping center. (A. 23) Where virtually all people drive onto the shopping center premises and do not have to set foot on its publicly owned surroundings, leafleting and picketing are effective only because of their instantaneous nature. (A. 23) The discussion of, and signing of, petitions requires personal contact in a manner precluded by roadside forums.

When they were asked by the Pruneyard's security officer to leave the premises, the students were advised that they could continue their petition project on the public sidewalk that ran along two sides of the property. (A. 27)

By admission of the Pruneyard's manager of operations, there is only a small amount of foot traffic on those sidewalks. (A. 48)

The students subsequently contacted the shopping center management, and offered to submit to any reasonable regulations so as to continue their project. (A. 8) The Pruneyard stated that the activity would not be allowed under any circumstances. (A. 14)

The students filed for an injunction to enjoin the Pruneyard from prohibiting the solicitation of signatures for their petitions in the common areas of the shopping center. (A. 6) The Superior Court of California, County of Santa Clara, denied the request. (J.S.App. A-4) The Court of Appeal affirmed, and the students petitioned for a hearing in the California Supreme Court. (J.S.App. B-11)

The Petition for Hearing was granted, and after consideration of the parties' briefs, several *amicus* briefs on both sides, and oral argument by both sides, the California Supreme Court reversed the judgment of the trial court. (J.S.App. C-13) After considering and denying the Pruneyard's Petition for Rehearing, (J.S.App. D-1) the State Supreme Court remitted the cause to the trial court with instructions that the requested injunction be issued. (A. 67)

The Pruneyard immediately sought from this honorable Court a stay of the mandate of the State Court. That application was denied by Mr. Justice Rehnquist, and the injunction was issued.

The trial court found that other sites, private and public, in Santa Clara County offered adequate and effective alternative forums for the students. (J.S.App. A-2)

The trial court did not find that alternative public forums, considered alone, were adequate and effective.

The California Supreme Court did not agree with the trial court's conclusion that "[t]here are adequate, effective channels of communication for plaintiffs other than soliciting on the private property of the Center." (J.S. App. A-3) The fact found by the State Supreme Court was that "[s]hopping centers to which the public is invited can provide an essential and invaluable forum for exercising [the rights of petition and speech]." (*Robins v. Pruneyard*, 23 Cal.3d 899, 910, 153 Cal.Rptr. 854, 860) (J.S.App. C-12)

The California Supreme Court, in finding that shopping centers in California are essential and invaluable forums, had been briefed as to the socio-economic circumstances existing in the state which makes access to shopping centers necessary for the effective exercise of the conduct at issue. The evidence indicated that shopping centers are the gathering places for California communities. Furthermore, privately owned shopping centers, because of their planned convenience, wide range of goods and services, and attractiveness to businesses which formerly were situated in downtown areas, not only have replaced the traditional public forums but were the principal cause of their demise.

The Fair Political Practices Commission, a California administrative agency established to oversee the State's electoral processes, appeared before the California Supreme Court as an *amicus curiae* in support of the students' case. The State Supreme Court expressly noted the

position of that state regulatory body that "because of the large number of signatures required to succeed in an initiative, referendum or recall drive, guaranteeing access to voters is essential to make meaningful the right to mount such a drive." (*Robins v. Pruneyard*, 23 Cal.3d 899, 908, 153 Cal.Rptr. 854, 858-859 [footnote 4]; J.S. App. C-9)

### SUMMARY OF ARGUMENT JURISDICTIONAL SUMMARY

The *Pruneyard* argues that *Lloyd v. Tanner* (1972) 407 U.S. 551, made shopping centers immune from otherwise proper state regulation. That argument has no merit.

This court, in *Lloyd, supra*, did not diminish the power of the states to regulate, but rather established the limits of the First Amendment as a basis of such regulation. That much is made clear by *Hudgens v. NLRB* (1976) 424 U.S. 507, where a shopping center's right to control conduct was held to be subject to the National Labor Relations Act. Fifth and Fourteenth Amendment rights do not include immunity from regulation.

An argument so devoid of merit, so contrary to prior decisions of the Court, does not present a substantial federal question suitable for Supreme Court review. *Equitable Life Assurance Society v. Brown* (1902) 187 U.S. 308, 311; *Zucht v. King* (1922) 260 U.S. 174.

The decision below rests expressly on the California Supreme Court's construction of petition and speech rights under the State Constitution. State law provides that such rights may be protected from irreparable injury by an injunction restraining those who would deny them. Fur-

thermore, the states have the power to reasonably regulate property uses for the common good. The opinion therefore rests on adequate and independent state grounds, and Supreme Court review is inappropriate. *Fox Film Corp. v. Muller* (1935) 296 U.S. 207.

Appellants argue two issues for which they fail to set a jurisdictional foundation. They contend that the State's action below is a "taking" and that the protection of appellees' rights violates the First Amendment rights of the appellants.

The opinion below makes no mention of these issues. In such a situation, it has been assumed by this Court that the absence of the issue is due to want of adequate presentation in the state court, unless the aggrieved party makes an affirmative showing to the contrary. *Street v. New York* (1969) 394 U.S. 576, 582.

Appellants' affirmative duty is to show not only the existence of a federal question, but also that it was properly raised under state law. (See, e.g., *Williams v. Georgia* (1955) 349 U.S. 375, 382-383). The duty is also set forth in Supreme Court Rule 15(1)(d).

Appellants have failed to make any such showing with respect to the "taking" and "negative First Amendment" questions addressed in their brief. They have had two opportunities to do so (Jurisdictional Statement and Brief of Appellants).

It is respectfully requested that this Court dismiss this matter for failure by appellants to present a substantial federal question.



### SUMMARY OF ARGUMENT ON THE MERITS

*Lloyd v. Tanner* (1972) 407 U.S. 551, does not support appellants' argument that shopping center owners were therein granted immunity from regulations protecting petition and speech activities under state law.

That case defines the scope of First Amendment protection, but does not diminish the power of the states to give greater protection to petition and speech rights under their own constitutions. Nor does *Lloyd* in any way diminish the power of the state to regulate property and resolve disputes between its citizens under state law. *Hudgens v. NLRB* (1976) 424 U.S. 507.

The argument that appellants' reliance on *Lloyd* does not give rise to a substantial federal question is equally applicable to the correctness of the decision below on the merits.

Nor can California's action reasonably be called a taking. Since the public is generally invited to the premises, appellants' right to exclude is waived, and there is no resulting physical invasion.

A state may properly impose reasonable restrictions on one's use of property in arriving at a fair and just adjustment of rights for the common good. *Andrus v. Allard*, No. 78-740 (November 27, 1979), 48 U.S.L.W. 4013. There is no evidence that appellants have, or will suffer any injury by virtue of the protected conduct.

The decision below does not violate appellants' freedom of thought. Nor is there any indication that any idea or protected conduct is susceptible to being attributed to

appellant by virtue of his status as property owner. Furthermore, if shopping center owners are allowed to control expression in their common areas, they will become both censors and overseers of public opinion and awareness. No such monopoly over the marketplace of ideas was intended by the framers of the First Amendment.

Expert evidence and published socio-economic sources establish the crucial nature of the shopping center's role in California.

Shopping centers have been, by design, the principal cause of the central business district's failure. They have both followed suburban growth, and drawn such growth to themselves. For many Californians the shopping center is the only "town center" there ever was.

Although the shopping center industry claims herein that centers are not equipped to provide forums, it is strongly indicated that the industry consensus sees centers as socially responsive members of the community. They satisfy the whole range of human needs, and are the focal point of the community for all activities.

In California, where petitions are encouraged and are incorporated into the governing process, shopping centers are essential and invaluable forums.

## ARGUMENT

### I

**THERE IS NO ADEQUATE BASIS UPON WHICH THE COURT MAY TAKE JURISDICTION OVER THIS MATTER. THE FEDERAL SYSTEM OF OUR GOVERNMENT ALLOWS AND ENCOURAGES THE STATES TO RESOLVE THEIR PECULIAR PROBLEMS UNDER STATE LAW. THIS COURT'S PRIOR DECISIONS CONCERNING EXPRESSIVE ACTIVITY IN SHOPPING CENTERS WITHHELD FEDERAL PROTECTION UNDER THE FIRST AMENDMENT, BUT NO DECISION HAS UNDERMINED THE STATES' POWER TO REGULATE SUCH PROPERTY TO PROTECT FUNDAMENTAL STATE RIGHTS. THE MATTER BEFORE THE COURT WAS DECIDED ON ADEQUATE AND INDEPENDENT STATE GROUNDS, AND NO SUBSTANTIAL FEDERAL QUESTION HAS BEEN RAISED.**

**A. The Rights of Petition and Incidental Speech Are Inherent Within a Democratic Society. Such Rights Are Especially Fundamental in California Where They Are Expressly Guaranteed by the State Constitution, and Are Used in the State's Governing Processes.**

Appellees are residents of the State of California. They were aggrieved by certain political situations, and decided to amplify their grievance through their community's voice by circulating petitions addressed to the President of the United States and Members of Congress. (A. 7, 21)

The right to petition is fundamental to democratic self-government. "The very idea of government, republican in

form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." *United States v. Cruikshank* (1875) 92 U.S. 542, 552.

The rights of petition and speech are expressly guaranteed by the Constitution of the State of California,<sup>1</sup> and such protection is not limited to instances of state action. (*Diamond v. Bland* (1970) (*Diamond I*) 3 Cal.3d 653, 91 Cal.Rptr. 501, 477 P.2d 733; *In re Lane* (1969) 71 Cal.2d 872, 79 Cal.Rptr. 729, 457 P.2d 561; *In re Hoffman* (1967) 67 Cal.2d 845, 64 Cal.Rptr. 97, 434 P.2d 353; *Diamond II v. Bland* (1974) 11 Cal.3d 331, 335, 113 Cal.Rptr. 468, 471, 521 P.2d 460, 463 (dissenting opinion of Mosk, J.).

The right to petition is of particular importance in California where the State, through its power to establish its governing processes under the Tenth Amendment to the United States Constitution,<sup>2</sup> has made it "vital to a basic process in the state's constitutional scheme—direct initiation of change by the citizenry through initiative, referendum, and recall. (Cal. Const., Art. II, Sections 8, 9, and 13.)" *Robins v. Pruneyard* (1979) 23 Cal.3d 899, 907-908 (J.S.App. C-8-9) (footnote omitted).

<sup>1</sup>Petitioning is protected by California Constitution, Article I, Section 3: "The people have the right to instruct their representatives, petition the government for the redress of grievances, and assemble freely to consult for the common good."

Speech is protected by California Constitution, Article I, Section 2: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

<sup>2</sup>Each state has a constitutional responsibility and power under the Tenth Amendment to establish and operate its own government. See, e.g., *Sugarman v. Dougall* (1973) 413 U.S. 634, 647.

In recognition of the importance of speech and petition rights that Appellees seek to exercise, and of the socio-economic role of shopping centers in the State, the California Supreme Court found that shopping centers, such as the Pruneyard "can provide an essential and invaluable forum for exercising those rights." (J.S. C-12)

California has, by means of an injunction, restricted one aspect of the Pruneyard's property rights. In order to protect Appellees and the general public in California from irreparable injury, the State has imposed a reasonable regulation upon shopping center property.

**B. The States Have the Power to Impose Reasonable Restrictions on the Use and Control of Private Property in Order to Protect Their General Welfare. That Power Has Not Been Diminished by This Court's Decisions Concerning Access to Shopping Centers.**

The primary jurisdictional issue before the Court depends on whether *Lloyd v. Tanner* (1972) 407 U.S. 551, vested shopping center owners with a constitutional right to prohibit speech and petition activities on their property even though state law commands that such conduct be allowed for the preservation of the general welfare.

*Lloyd* is not controlling herein. That case presented the question whether the First Amendment to the United States Constitution protected certain conduct, handbilling and incidental speech, in privately owned areas of a shopping center in Portland, Oregon.

*Lloyd* held that First Amendment *guarantees* apply only in cases of state action, and that a shopping center does not possess the characteristics of a state.

"In addressing this issue, it must be remembered that the First and Fourteenth Amendments *safeguard* the rights of free speech and assembly by limitations on *state* action, not on action by the owner of private property used non-discriminatorily for private purposes only." (*Lloyd v. Tanner*, 407 U.S. at 567, *first emphasis added, second in original.*)

"We hold that there has been no such dedication of Lloyd's privately owned and operated shopping center to public use as to *entitle* respondents to exercise therein the asserted First Amendment rights." (*Lloyd v. Tanner*, 407 U.S. at 570, *emphasis added.*)

Having decided that the *guarantees* of the First Amendment were not applicable in *Lloyd*, the Court did not foreclose the possibility that the individual's First Amendment activity could prevail over the property interests of the shopping center owner.

"We do say that the Fifth and Fourteenth Amendment rights of private property owners, as well as the First Amendment rights of all citizens, must be respected and protected. The Framers of the Constitution certainly did not think these fundamental rights of a free society are incompatible with each other. There may be situations where accommodations between them, and the drawing of lines to assure the due protection of both, are not easy. *But on the facts presented in this case*, the answer is clear." (*Lloyd v. Tanner*, 407 U.S. at 570, *emphasis added.*)

Appellees respectfully submit that only the first of *Lloyd's* two levels of inquiry is of Constitutional dimen-



sion. Contrary to the arguments of the Pruneyard and supporting *amici curiae* from the shopping center industry, the result of a factual evaluation of competing interests is not controlling in controversies characterized by different facts and concerns.

The state action requirement for protection under the Federal Constitution has special meaning. It exemplifies the Federal government's proper role in our nation's governmental scheme, i.e., to protect the people from abuse by the states. At the same time, it is largely the responsibility of the states to establish and maintain their own systems of government, and to resolve disputes between their residents, subject to the guarantees of the Federal Constitution. Federalism recognizes that differences exist in our society, and that nationwide regulation is not always necessary or appropriate.

This policy of federal restraint which underlies the state action limitation of First Amendment protection, also militates against the notion that *Lloyd* gives shopping center owners an unassailable Constitutional right to prohibit expressive activity in shopping center common areas. In deciding the reach of the First Amendment as against the property rights of shopping center owners, it was not necessary for the Court to rule on the power of a state to regulate the use and control of such property.

The issue was clarified and settled in *Hudgens v. NLRB* (1976) 424 U.S. 507, where, in describing the federal constitutional principles involved in *Lloyd*, the Court gave exclusive emphasis to the language concerning the absence

of state action, and the resulting non-availability of First Amendment protection (424 U.S. at 518-520).

*Hudgens* makes it clear that *Lloyd* did not immunize shopping center owners from reasonable regulations properly based on non-First Amendment grounds. Appellees respectfully submit that *Hudgens* invited the states to assess their own situations, and regulate shopping center property accordingly, by noting that "statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others, [although] no such protection or redress is provided by the Constitution itself." (424 U.S. at 513)

Indeed, *Hudgens* expressly states that a shopping center owner's power to prohibit expressive activity is subject to reasonable regulation: "[T]he rights and liabilities of the parties in this case are dependent *exclusively* upon the National Labor Relations Act." Under the Act the task of the Board, subject to review by the courts, is to resolve conflicts between Section 7 rights and private property rights, "and to seek a proper accommodation between the two." (424 U.S. at 521, emphasis added)

Appellants' contention that shopping center owners have a paramount constitutional right to prohibit expressive activity does not withstand the *Hudgens* decision. The scope of such a right could not depend exclusively on the National Labor Relations Act, which is precisely the holding in *Hudgens*. It is significant that Appellants' Brief in this Court gives *Hudgens* only cursory discussion.

*Hudgens* indicates that a regulatory body charged with a specific purpose may restrict shopping center property rights in furtherance of that purpose. In this case the regulatory body is the California Supreme Court, which is charged with the duty and purpose to construe the State Constitution and to adjudicate disputes that arise thereunder.

The State of California has a legitimate interest in protecting rights of its citizens to discuss issues, and to circulate and sign petitions on those issues. The fundamental role of such conduct in a democracy compels the protection of such interests. The special significance of the petition in the state's governmental scheme makes the interest of the state even more compelling.

*Hudgens* clearly shows that appellants' property rights are not immune from restrictions imposed for the benefit of other interests protected by statutory and common law. The decision of the California Supreme Court protects important state rights by imposing a reasonable and specific restriction on appellants' property rights.

Appellants' contention that shopping centers are immune from state regulation in this matter is so explicitly foreclosed by *Hudgens* that there can be no controversy. *Equitable Life Assurance Society v. Brown* (1902) 187 U.S. 308, 311. The question raised is therefore so insubstantial as to defeat this Court's jurisdiction. *Zucht v. King* (1922) 260 U.S. 174.

**C. The Decision of the California Supreme Court Is Based on Adequate and Independent State Grounds, and This Court Should Decline Further Review for That Reason.**

That the decision below is based upon state, rather than federal grounds, is first made apparent in the California Supreme Court's opening paragraph:

"In this appeal from a judgment denying an injunction we hold that the soliciting at a shopping center of signatures for a petition to the government is an activity protected by the California Constitution." (J.S. App. C-1)

The remedy sought by the students and granted by the state court is the subject of state law. California's Code of Civil Procedure, Section 526, specified the following applicable basis for injunctive relief:

*Grounds for Issuance.*

"An injunction may be granted in the following cases:

"1. When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually.

• • • •"

The complaint herein alleges that the students were attempting to circulate petitions to the government on the premises of the shopping center, and that the Pruneyard was preventing such conduct.

Given the California Supreme Court's ruling, quoted above, that the students were entitled to protection for such conduct under the State Constitution, the injunction was properly issued under state law.

The Pruneyard has consistently argued only that *Lloyd v. Tanner*, 407 U.S. 551, prevented the State Courts from granting relief under state law. In its well reasoned opinion, the California Supreme Court addressed that issue prior to discussing the scope of the students' rights under the State Constitution.

The California Supreme Court found nothing in *Lloyd, supra*, which would prevent it from restricting under state law appellants' conduct complained of by the students. (See J.S.App. C-4 to C-9)

Finding no existing impediment to a state law basis of decision, the Court below held:

"We conclude that Sections 2 and 3 of Article I of the California Constitution protect speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned." (J.S.App. C-12)

This honorable Court has never decided whether the First Amendment protects petitioning in shopping centers found to be essential and invaluable forums for such activity. The issue need not be considered at this time.

Where a case may have been decided upon two grounds, one federal, the other non-federal, this Court's first inquiry must be whether the non-federal ground is independent of the federal ground and adequate to support the judgment. *Fox Film Corp. v. Muller* (1935) 296 U.S. 207.

Clearly the Constitution of the State of California is a body of law independent of any federal doctrine. And this Court has recognized that "[i]t is fundamental that state courts be left free and unfettered by [this court] in interpreting their state constitutions." *Minnesota v. National Tea Company* (1940) 309 U.S. 551.

In a case such as this, where the state court's decision rests on an adequate non-federal ground, review by this Court is precluded. *Fox Film Corp. v. Muller* (1935) 296 U.S. 207.

**D. The Adequacy of the State Ground Herein Finds Strong Support in Prior Decisions of this Court Concerning the Power of the State to Define and Regulate Property Rights.**

The task of defining property rights has generally been left to the states. *Bishop v. Wood* (1976) 426 U.S. 341.

Similarly, it has long been held that states have the power to impose reasonable restrictions on the use of private property for the benefit of the public welfare. *Village of Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365; *Village of Belle Terre v. Boraas* (1974) 416 U.S. 1.

An analogous situation came before the Court in the mid-1960's. The Court was faced in several cases with the question whether the state action requirement of the Fourteenth Amendment precluded the extension of equal protection guarantees to racial minorities who were denied the use of privately owned facilities. See, e.g., *Griffin v. Maryland* (1964) 378 U.S. 130; *Robinson v. Florida* (1964) 378 U.S. 153; *Lombard v. Louisiana* (1963) 373 U.S. 267; *Bell*



*v. Maryland* (1964) 378 U.S. 226. Those members of the Court who insisted that there was insufficient state involvement upon which to base constitutional protection were very careful to note that their views did not implicate or restrict

"[t]he power of Congress to pass a law compelling privately owned businesses to refrain from discrimination on the basis of race. Our sole conclusion is that Section 1 of the Fourteenth Amendment does not prohibit privately owned restaurants from choosing their own customers . . . as long as some valid regulatory statute does not tell him to do otherwise." (*Bell v. Maryland, supra*, 378 U.S. at 343. Black, J. dissenting, joined by Harlan, J. and White, J.)

When the validity of the nationwide public accommodations statute was presented in *Heart of Atlanta Motel, Inc. v. United States* (1964) 379 U.S. 241, the Court rejected the claims that the statute violated substantive due process or the takings clause (379 U.S. at 258-261). Mr. Justice Black, who had argued against extension of equal protection guarantees without state action, wrote separately in *Heart of Atlanta* to note that

"This Court has consistently held that the regulation of the use of property by the Federal Government or by the states does not violate either the Fifth or Fourteenth Amendment. . . . A regulation such as that [in the] 1964 Civil Rights Act does not even come close to being a 'taking' in the constitutional sense. . . . Nor does any view expressed in my dissenting opinion in *Bell v. State of Maryland*, 378 U.S. 226, 318, 84 S.Ct.

1814, 1864, 12 L.Ed.2d 822, in which Mr. Justice Harlan and Mr. Justice White joined, affect this conclusion in the slightest for that opinion stated only that the Fourteenth Amendment in and of itself . . . does not bar racial discrimination in privately owned places of business in the absence of state action." (379 U.S. at 277-278) (Black, J. concurring)

Mr. Justice Black's interpretation of the constitution in the civil rights cases was simple, and literal. In that view, those provisions which call for state action offer protection against the government, or an accepted substitute, only.

*Lloyd v. Tanner* (1972) 407 U.S. 551, came to the Court through the federal system. Protection was sought against a private property owner solely under the First Amendment. The guarantees of the First Amendment were held to require state action. (407 U.S. at 567)

To paraphrase Mr. Justice Black in *Heart of Atlanta, supra*, the decision in *Lloyd*, that the First Amendment in and of itself does not bar shopping center owners from prohibiting handbilling in the absence of state action, does not have the slightest bearing on the question whether a state may protect petitioning on the basis of a state constitutional guarantee which does not require the presence of state action.

A prior refusal by this Court to restrict property rights in the absence of state action has never been held to prevent the states from imposing a similar restriction under state law. Appellants' argument to the contrary does

not, therefore, address a substantial federal question. The regulation of property herein is no more than an adjustment of rights for the public good under state law, and the appeal should be dismissed.

**E. The Taking Issue Is Not Properly Raised Before the Court.**

Prior to discussing the taking argument made by appellants at pages 10-11 of Appellants' Brief, it is noted that the Pruneyard never even suggested in state court that its injunction would constitute a taking.

The issue was not raised as a defense at trial (see Answer to Complaint, A. 10-12). Nor was it argued by the Pruneyard at any appellate level in California. The California Supreme Court did not pass on the question now raised (J.S.App. C.1-13), nor was taking mentioned by the California dissenters (J.S.App. C.13-20).

Up to this point the question has been whether the State Constitution protected the students' conduct, and, if so, whether the state could regulate shopping center property to protect the rights of speech and petition from virtual extinction.

Before the California Supreme Court, the Pruneyard did argue that its property rights were absolutely protected by the Fifth and Fourteenth Amendments. However such reference was never in connection with a "taking" argument, but only in connection with their assertion that *Lloyd* had established for shopping centers an absolute and paramount right under those Amendments.

The United States Supreme Court does not have jurisdiction unless a substantial federal question was raised and decided in the state court below. *Cardinale v. Louisiana* (1969) 394 U.S. 437, 438.

This Court does not decide issues raised for the first time at this level. *Tacon v. Arizona* (1973) 410 U.S. 351, 352.

The California Supreme Court failed to pass upon a taking issue. Appellees submit that the issue was not adequately framed nor properly raised before that Court.

Rule 15(1)(d), Rules of the Supreme Court, provides that "If the appeal is from a state court, the statement of the case shall also specify the stage in the proceedings in the court of first instance, and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to change and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record where the matter appears . . . as will support the assertion that the rulings of the court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this court."

The Pruneyard has failed to meet this burden with respect to the taking issue. Neither the Jurisdictional Statement nor Appellants' Brief shows when, where, or how the Pruneyard raised the question.

The trial court record, especially the Answer (A. 10-12), oral argument by appellants' attorney (R.T. 8-10), and the trial court's findings of fact (J.S.App. A-1), reveal no mention of a taking issue. In fact, the Fifth Amendment was not even mentioned as a general basis of appellants' theory. (R.T. 8-10)

Since the California Supreme Court failed to pass upon a taking issue, it must be assumed that such omission was due to the failure of appellants to properly present the issue in the state court. And, since the Pruneyard has made no affirmative showing to the contrary, there is no jurisdictional basis for its presentation at this time. *Street v. New York* (1969) 394 U.S. 576, 582.

**F. Appellants Have Not Met Their Burden of Showing that the Issue of Their Own First Amendment Rights Was Raised in the State Court.**

The Pruneyard now places great emphasis on a contention that the action of the State Court violates the First Amendment rights of shopping center owners.

Though it is demonstrated hereinbelow that the argument has no merit, appellees respectfully submit that this alleged federal question was not properly raised in the state court, and that the Pruneyard has failed to make any showing to the contrary.

The only language of Appellants' Jurisdictional Statement or Brief which remotely attempts to establish a jurisdictional foundation for this issue is found at page 12 of the Jurisdictional Statement: "Although the California Supreme Court opinion discusses at length the free

speech rights of appellees, it fails to recognize the First and Fourteenth Amendment free speech rights of appellants."

In that respect, appellants are correct. A review of the opinion below reveals not even the vaguest reference to the Pruneyard's claim now in question.

When "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York* (1969) 394 U.S. 576, 582.

Again, it is pointed out that the issue in question was not raised at the trial court. (See, e.g., Answer at A. 10-12.)

The Pruneyard has completely ignored the requirement of this Court's Rule 15(1)(d) as to the showing of a jurisdictional foundation for the issue. It is respectfully submitted, on the basis of the entire record, that this failure is due solely to appellants' lack of proper presentation of the issue in the court below.

Accordingly, appellants' "negative" First Amendment argument does not provide a jurisdictional basis for this Court. *Cardinale v. Louisiana* (1969) 394 U.S. 437, 438.



## II

**CALIFORNIA'S RESTRICTIONS ON THE PRUNEYARD'S POWER TO CONTROL ITS PROPERTY DOES NOT CONSTITUTE A TAKING UNDER THE FIFTH AMENDMENT.**

Principles of taking, just compensation, condemnation, and inverse condemnation now appear in appellants' argument (Brief of Appellant, pp. 10-12).

Appellees respectfully submit that such issues are not properly before the Court. As previously shown herein, (see Section I-E, *supra*), appellants have failed to lay a jurisdictional foundation for this question either in their Brief or in their Jurisdictional Statement. There is no showing by appellants, or any indication in the record, that a taking question was properly and adequately raised at the state level.

Even had such question been raised, it would be answered in favor of the judgment below. The opinion below does not interfere with appellants' use of shopping center property. The only evidence in the record concerning the effect of the students' conduct on the Pruneyard is that the petition project was well received by appellants' patrons (App.-23), and that the students were orderly in their conduct (App.-22-23). The students were not competing with the Pruneyard, or in any way detracting from its operation. There is no evidence that appellants have suffered any economic injury whatsoever, or that they will in the future.

Brief of Appellants, page 11, cites decisions of this Court in support of the taking argument. None support appellants' position.

*Rowan v. Post Office Dept.* (1970) 397 U.S. 728, involved the constitutionality of a federal statute pursuant to which a person may request the Postmaster General to order the removal of the person's name from the mailing list of a sender of "pandering" advertisements. (39 U.S.C. Section 4009, "Prohibition of pandering advertisements in the mails.") The primary issue was whether the statute violated the free speech and due process rights of the "mailers" under the First and Fourteenth Amendments (397 U.S. at 731).

The fundamental values protected in *Rowan, supra*, were not property rights, but privacy rights. The legislative objective "was to protect minors and the privacy of homes from such material and to place the judgment of what constitutes an offensive invasion of these interests in the hands of the addressee" (397 U.S. at 732).

"The ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another." *Rowan, supra*, 397 U.S. at 737.

The opinion below does not violate the privacy of family and home. Nor, by protecting speech and petition rights in a public gathering place, has the California Supreme Court effected a taking of privacy—related property rights.

*Delaware, Lackawanna & Western Railroad Company v. Town of Morristown* (1928) 276 U.S. 182, cited in Brief of Appellants, page 11, involved a local ordinance that estab-

lished a cab stand on the premises of a privately owned railway station. The railroad had contracted with a particular cab company for exclusive service on the premises. The company did not have enough permits to give adequate service. The town, objecting to the contractual arrangement as creating a monopoly and injuring other cabmen, refused to issue the company additional permits. The town's decision was upheld in state court.

The town then enacted the ordinance in question. Other cabmen began parking in the space and soliciting fares. This Court struck down the ordinance, holding that it violated the Fourteenth Amendment due process clause. (276 U.S. at 193)

In *Delaware, Lackawanna & Western Railroad, supra*, the ordinance forced upon the railroad a commercial use which nearly destroyed the value of its exclusive cab service agreement. The railroad had a reasonable and an actual expectation of compensation from that commercial use. That expectation was shattered by the ordinance, which in effect established a zone for commercial use from which no compensation would be derived. (276 U.S. at 193)<sup>3</sup>

Even so, as Mr. Justice Brandeis noted in his concurring opinion (joined by Holmes, J.), the railroad could not expect compensation whenever a third party entered the property in a commercial role. The railroad had a duty to recognize the basic needs of its patrons, including the pro-

<sup>3</sup>The reasonableness of the property owner's expectation of compensation as a basis for application of the Takings Clause was recently considered by the Court in *Kaiser Aetna v. United States*, Dock. No. 78-738 (Dec. 4, 1979), 48 U.S.L.W. 4045. That case is discussed *infra*.

vision of suitable transportation to and from the station. (276 U.S. at 199, concurring opinion of Brandeis, J.)

Therefore, even as early as the *Delaware, Lackawanna & Western Railroad* case of 1928, *supra*, it was recognized that the owner of private property which is used by the public is subject to regulation for the public welfare. One's expectation of compensation does not apply where a particular third party use of the property is imposed for the benefit of the public that is present on the property.

The Pruneyard has no interest in the communication that takes place among the members of the public that go there. Unlike the railroad company in *Morristown*, a shopping center has no reasonable expectation of compensation from the activity in question. Nor do conversations become property-related simply because they result in the signing of a paper concerning the topic of discussion.

*Delaware, Lackawanna & Western Railroad, supra*, therefore supports the decision below. No compensable taking occurs when the state protects communication between individuals on private property. Since the owner has no right to silence his patrons he suffers no loss by their non-interfering speech and petitioning. Furthermore, the owner of land which serves the general public is subject to reasonable regulations imposed for the public welfare. (276 U.S. at 199, concurring opinion of Brandeis, J.)

The recently announced opinion of this Court in *Kaiser Aetna v. United States*, No. 78-738 (December 4, 1979) 48 U.S.L.W. 4045, contains language which, if taken out of context, arguably supports appellants' taking contentions.

Appellants rely on the statement that "the 'right to exclude' so universally held to be a fundamental element of the property right, falls within this category of interests that the government cannot take without compensation." (48 U.S.L.W. 4045, 4049)

The issue in *Kaiser Aetna* was whether the public could freely enter a private enclave in spite of the owner's intention that access be limited to residents and other fee-paying users. Thus, the Court was not considering whether important public interests can be protected in what is, in fact, a gathering place of the public.

In *Kaiser Aetna*, a land developer had acquired private property which included a pond. At great expense, the developer dredged the pond, connected it to an adjacent public waterway, and built a marina and subdivision community on the property. Use of the facilities, including the pond, was offered only to residents of the development and those renting marina space. The property owner had not opened the facilities to the public whatsoever.

The developer, who had a fee interest in the pond under state law, had dredged the pond and connected it to the ocean so as to make it navigable in fact. The government argued that "as a result of one of these improvements, the pond's connection to the navigable waterway in a manner approved by the Corps of Engineers, the owner has somehow lost one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others." (*Kaiser Aetna*, 48 U.S.L.W. at 4049.)

After noting generally that the right to exclude is an interest that cannot be taken without compensation, the court explained that "(t)his is not a case in which the government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners' private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina." (*Kaiser Aetna*, 48 U.S.L.W. 4049-4050.)

The "right to exclude" described in *Kaiser Aetna* is not at issue in this case. The Pruneyard is open to the public during operating hours and it has never been contended that the students, or any members of the public, do not have access to the property. Therefore, this is not a physical invasion case, and the reasoning behind the taking rule of *Kaiser Aetna* should not be applied.

In other words, by opening itself to the public the Pruneyard has generally waived its right to exclude. The opinion below does not result in a physical invasion, but rather a restriction on the Pruneyard's ability to control the conduct of individuals who are permissibly on the property.

This case is also different from *Kaiser Aetna* in that the regulation imposed by the state will not cause a devaluation of the property, or use, in question. There is no evidence of diminished property value in the record. Other shopping center interests, before the Court as *amici curiae*, contend that the protected conduct is detrimental to business and property values. This allegation is not supported in the record. Furthermore, where all shopping centers in California are equally affected under the law, it is incon-



ceivable that their market value is adversely affected. Since the regulation gives no advantage to any property devoted to that use, there can be no disadvantage to property or business values. And if the property should be marketed for a different use, the regulation would naturally disappear.

The briefs from the shopping center industry claim a substantial injury will be incurred in administering the reasonable regulations they may establish under the opinion below.<sup>4</sup> That burden is mostly speculative, but to the extent it may exist in such legitimate areas as scheduling, it is certainly minimal. In this regard, it must also be pointed out that the shopping center industry owes its very existence to public patronage. It is an industry that has contributed to urban decay and suburban sprawl. The complaint about this minimal burden is, therefore, ironic since, as recently noted by this Court, "(a regulation) is a burden borne to secure 'the advantage of living and doing business in a civilized community.'" *Andrus v. Allard*, No. 78-740 (November 27, 1979), 48 U.S.L.W. 4013, 4017, quoting from *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393, 422 (Brandeis, J., dissenting).

The cases and concerns cited by appellants and their supporting *amici curiae* do not, therefore, establish the existence of a taking in this case. The California Supreme Court has done no more than to reach a reasonable and specific accommodation between petition and speech rights,

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<sup>4</sup>Shopping center briefs charge that the decision below will result in litter from handbills, solicitation of money, violence, picketing, and religious activities. The first paragraph of the decision makes it clear that such activity is not protected. (J.S.App. C-1)

on one hand, and property rights on the other. It has recognized that, at least in California, shopping centers are the principal places of public assembly, the center of the community. (J.S.App. C-11-12) The Court below recognizes that to a certain extent the public's interests and needs exist wherever the public is present, and that for speech and petition activities the public presence in shopping centers makes them essential and invaluable forums. But by restricting such activity to common areas, by allowing for reasonable regulations, and by limiting its holding to specified activities, the Court below truly accommodates for the benefit of all.

As this Court stated in *Andrus v. Allard*, *supra*:

" . . . (G)overnment regulation—by definition—involves the adjustment of rights for the public good . . . "The Takings Clause, therefore, preserves governmental power to regulate, subject only to the dictates of 'justice and fairness'. There is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate . . . Resolution of each case however, ultimately calls as much for exercise of judgment as for application of logic.

" . . . (T)he denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."

*Andrus v. Allard*, 48 U.S.L.W. 4013, 4017.

Appellees respectfully submit that the court below has not offended "dictates of 'justice and fairness'" in its "adjustment of rights for the common good." The Prune-

yard's aggregate property rights are unchanged, except that its owners cannot now prohibit certain non-detrimental conduct by and between members of the public who are otherwise welcome on the premises.

The principle upon which the California Supreme Court adjusted rights for the common good was described in *Marsh v. Alabama* (1946) 326 U.S. 501:

"Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."  
(326 U.S. at 506)

Since there is no economic detriment to appellants, nor any interference with their present use, nor any physical invasion of their property as a result of the opinion below, there is no taking. The decision of the California Supreme Court is a fair and equitable adjustment of rights for the common good, and the restriction imposed is therefore valid.

### III

#### THE PROTECTION OF SPEECH AND PETITIONING BETWEEN MEMBERS OF THE PUBLIC DOES NOT VIOLATE FIRST AMENDMENT RIGHTS OF INDIVIDUALS WHO OWN THE PROPERTY UPON WHICH THE PUBLIC IS PRESENT.

Appellants contend that they have a right, under the First Amendment, to disallow expressive activity between members of the public who are in the shopping center. The *Pruneyard* describes the right as "the right 'to decline to

foster' speech and to 'refrain from speaking'" (Brief of Appellants, page 14). They contend that such right is applicable to this case and that it has been violated.

As a preliminary matter, this Court should not consider the issue, regardless of its merit, since appellants have failed to show that it is properly raised. (See section I-F, *supra*)

But if for some reason the question is considered, it is respectfully submitted that appellants' argument lacks legal substance and basic logic. It is simply unrealistic to claim that a petition project, such as that of the students herein, offends appellants' "freedom of thought," or any personal First Amendment freedom of appellants.

This "negative" First Amendment argument draws on cases wherein the Court protected interests actually threatened by state action, such as privacy of thought (*Wooley v. Maynard* (1977) 430 U.S. 705; *Board of Education v. Barnette* (1943) 319 U.S. 624) and freedom of the press (*Miami Herald Publishing Co. v. Tornillo* (1974) 418 U.S. 241).

*Wooley*, *Barnette*, and *Miami Herald*, all *supra*, contained actual controversies where First Amendment freedoms were clearly offended. In each of those cases, there was an act of coercion whereby an individual was put into a position where an idea or statement could be attributed to his own thought or belief.

Appellants fail to explain how the protected activity in this case will result in the attribution of a thought or belief to a shopping center owner. Where the public knows that

petition and speech activities are protected in shopping centers, there is no reason for anyone to attribute the ideas in question to the landowner unless he personally endorses the project. The right of the shopping center owner to refrain from speaking therefore remains intact, and appellants' argument to the contrary is an invention, and an unfounded one at that.

In reality, the Pruneyard is not being forced to devote its property as a forum for others. The forum is not the property but the public presence on it. The opinion below does not require appellants to do anything with their property; rather, it recognizes that the significant public presence in the shopping center has certain attributes which the landowner may reasonably limit but not destroy, especially where such attributes are fundamental to the public welfare.

It cannot be disputed that individual expression is inevitable in places open to the public. It is common during a visit to a privately owned shopping center to see campaign or other expressive buttons, t-shirts, bumper stickers, and so forth. Moreover, it is reasonably certain that ideas and opinions are exchanged between individuals in shopping centers, as a result of one person's expression. Any public expression invites response either pro or con, silently or verbally. The interchange of ideas is therefore inevitable in shopping centers because it is a gathering place of the public, a forum in fact.

It is unrealistic for the Pruneyard to argue that expressive activity between members of the public in the shopping center is reflective of its own thoughts. Where expres-

sion already occurs there is no basis for the bare allegation that the manner of expression protected herein infringes upon appellants' speech rights. The petition is merely a documented statement of one public viewpoint. It differs from individual expression only in the degree of force it carries to its addressee. And the act of building that forceful statement requires communication among members of the public. It is illogical to conclude that conduct which seeks out and records public opinion on an issue is injurious either to the land upon which it takes place, or the private thoughts of the landowner.

Emphasizing the finding of the California Supreme Court that "(s)hopping centers to which the public is invited can provide an essential and invaluable forum for exercising those rights (speech and petition)," (J.S. App. C-12) appellees urge this court to recognize that if shopping centers in California can control the peaceful expression that takes place in their common areas, then shopping center owners can not only silence the public voice, but also tailor its expression to meet their own purposes.

Therefore, if shopping center interests had a First Amendment right to control peaceful and orderly expression on their property, which they do not, such persons could cause irreparable injury not only by preventing open public discourse, but also by controlling the community voice. No such monopoly over speech was intended by the authors of the First Amendment.

For these very clear reasons, appellees believe that appellants' First Amendment rights are not in controversy,



and that an application of the principles argued by appellants would make shopping center owners in California powerful censors and arbiters of public awareness and expression.

Appellants' argument of First Amendment injury is merely the "taking" issue recast. In each case there is a premise that communication between individuals in public somehow violates a right of the person on whose land the speaker is standing. In addressing either of appellants' theories it must first be recognized that the claimed violation is superficial, if it exists at all. In reality, expressive activity is a natural byproduct of public patronage. The inherent incidents of public assembly transcend such things as property lines. A landowner may keep his property for private use. In that case, he is exercising his option to control his property and what happens on his property. (See, e.g., *Kaiser Aetna v. United States*, Dock. No. 78-738 (December 4, 1979) 48 U.S.L.W. 4045.) Where, however, he opens his property to the public and then tries to restrict an inherent aspect of public presence, the landowner attempts to control not his property, but the rights of others.

The California Supreme Court has held that the state's constitution protects the right of speech and petition. People are not required to surrender those rights in exchange for entry to shopping centers. A shopping center owner has a right to refrain from speaking. He may be compensated when his property is taken for public use. But where public entry is granted, people will communicate. Where no taking or First Amendment prob-

lem exists in inevitable public discourse, it makes no sense to find any such violation simply because that discourse leads to the signing of a petition.

#### IV

**SHOPPING CENTERS, ESPECIALLY THOSE IN CALIFORNIA, ARE BY DESIGN AND ADMISSION, THE CENTER OF OUR COMMUNITIES. THE TRADITIONAL PUBLIC FORUM OF THE CENTRAL BUSINESS DISTRICT IS NOT ONLY THE FORERUNNER OF THE SHOPPING CENTER, BUT ALSO ITS VICTIM. IN CALIFORNIA, WITH ITS PREDOMINATELY SUBURBAN POPULATION, SHOPPING CENTERS ARE THE ONLY CENTERS AVAILABLE IN MANY AREAS. IT IS GENERALLY RECOGNIZED, EVEN BY THE SHOPPING CENTER INDUSTRY, THAT SHOPPING CENTERS SHOULD AND DO PLAY A ROLE IN SOCIETY, AND THAT THEIR USE IS NOT LIMITED TO DESIGNATED PURPOSES.**

The Pruneyard and its supporting *amici curiae* from the shopping center industry would have the Court believe that shopping centers are nothing more than large commercial entities with no social responsibility.

Studies of the industry and other published writings of which the Court may take notice clearly indicate that shopping centers serve not only a commercial function, but that they are the centers for satisfying nearly the total spectrum of human need.

The demise of the central business district, and the rise of shopping centers, are concurrent with San Jose's

decrease in central population and extensive suburban expansion.

Expert evidence taken at trial shows that between 1960 and 1970 there was an overall 67% increase in the population of Northern Santa Clara County, while central San Jose experienced a 4.7% population decrease. (A. 56) As of 1970, 92.2% of the county's population lived in suburban or rural communities. (A. 56-57)

In 1972, retail sales in San Jose's Central Business District totaled \$86,831,000. That figure is only 4.67% of the county's total sales of \$1,857,659,000 for that year. Deterioration of downtown retailing made post-1972 retail figures unavailable. (A. 60) Furthermore, it is reasonable to assume that a significant portion of the downtown retail activity is attributable to business rather than consumer spending.

It was further shown at trial that in a given thirty-day period between October, 1974, and July, 1975, 685,000 out of 788,000 adults living in Northern Santa Clara County, or 86.9% of that group, made one or more trips to one of the fifteen largest shopping centers in the area. (A. 61) In 1974, 25% of the county's adults visited the Pruneyard at least once in a given thirty-day period. (A. 65)

In 1974, the total retail sales of the 15 largest shopping centers in the county was \$455,112,996. (A. 61) There were, at that time, approximately 126 shopping centers in the county. (A. 61)

The analysis of demographics, retail sales figures, and goods and services offered by shopping centers, was conducted by appellees' expert "to ascertain at least what is available for persons to visit, congregate, and spend significant portions of their time. It appear(ed) clearly to the (expert) that the suburban shopping center complexes provide this availability." (A. 62)

Consideration of local circumstances led the expert to conclude, as paraphrased by the court below, that "(t)he largest segment of the county's population is likely to spend the most significant amount of its time in suburban areas where its needs and wants are satisfied; and shopping centers provide the location, goods and services to satisfy these wants and needs." (J.S.App. C-8; A. 62)

The expert evidence was relied on by the California Supreme Court in adjudicating between the competing interests. (J.S.App. C-8) Such evidence demonstrates the actual role played by shopping centers in Santa Clara County, and in California in general.

A shift in the national population is one cause of the California suburban phenomenon which makes the shopping center an indispensable forum. One authority, using census data for the years 1970-1975, has noted that people are migrating out of the eastern population centers and, except for those who move to the Southern states, most of them are settling in the West. It is indicated that by 1978 the combined population of the South and West will have surpassed that of the rest of the nation. At the same time there is another trend in which the urban areas of South and West are experiencing substantial outmi-

gration. Unlike the rest of the country, however, the movement in these growing regions represents an intra-metropolitan relocation to the suburbs of the same city.<sup>5</sup>

Another source has noted that the changing pattern of metropolitan life has two components: "The disruption of existing facilities caused by the stress of continuous growth of the urban system, and the long-run changes in our way of life."<sup>6</sup>

Due to increased mobility and the rise of suburbs, the walk-in store is disappearing, and high vacancy rates characterize the older continuous ribbon retail formations, among which is the traditional outlying public shopping district.<sup>7</sup>

There is also a direct relation between modern residential planning and shopping center development. It has been noted that "as the residential areas are now designed by community units rather than by single dwellings, shopping facilities are added by center instead of establishment."<sup>8</sup> In other words, the rapid increase in California's suburban population has seen shopping centers built to serve the new communities, and as to those communities there never has been a publicly owned center.

The end result is that the older retail patterns do not have the proximity, the parking, or the space to accommo-

<sup>5</sup>Thomas Muller, "Urban Growth and Decline," *Challenge*, May-June, 1976, pp. 10-11.

<sup>6</sup>James Simmons, *The Changing Pattern of Retail Location*, University of Chicago, Department of Geography, Research Paper No. 92, 1964, p. 147.

<sup>7</sup>Simmons, *supra*, pp. 148-149.

<sup>8</sup>Simmons, *supra*, p. 149.

date the growing suburban population. Nor do they offer the variety and convenience demanded by today's consumer. The traditional public shopping districts are being destroyed by the modern retail scheme in which competition is not between single establishments, but rather between shopping centers.<sup>9</sup>

## V

### THE ACTUAL ROLE OF THE SHOPPING CENTER IS NOT LIMITED TO COMMERCIAL FUNCTIONS. SHOPPING CENTERS IN CALIFORNIA ARE RECOGNIZED AS BEING CENTERS OF COMMUNITY ACTIVITY.

The recognition of the California Supreme Court that "(s)hopping centers to which the public is invited can provide an essential and invaluable forum for exercising [the rights of speech and petition]" (J.S.App. C-12), represents an accurate characterization of the role actually played by shopping centers in California.

Shopping centers not only can provide necessary forums; they have assumed that social responsibility and function. The shopping center is the modern day counterpart of the traditional town center and is "seizing the role once held by the central business district, not only in retailing, but as the social, cultural, and recreational focal point of the entire community."<sup>10</sup>

It is not contended that shopping centers are the functional equivalent of a municipal corporation—they have a

<sup>9</sup>Simmons, *supra*, pp. 147-149.

<sup>10</sup>Gurney Breckenfeld, "Downtown Has Fled to the Suburbs," *Fortune*, October, 1972, pp. 80-82.



uniqueness of their own. They are a socio-economic phenomenon, a product of modern marketing principles that has paralleled the development of suburban communities and automobile transportation.<sup>11</sup> They are lineal descendants of traditional community forums—the American town square, the great European marketplaces, and the Acropolis of ancient Greece.<sup>12</sup> The contention made here, which was agreed with by the California Supreme Court, is that shopping centers are the logical and natural forum, as well as a necessary forum, to which people must be able to turn in the context of existing social conditions.

A recognized change in socio-economic patterns has resulted in the decline of the town center and the emergence of shopping centers. In this regard, it was recognized as early as 1956 that shopping centers “evolved to meet the needs generated by changing environmental factors such as increasing urban population decentralization, increased use of the automobile, increased congestion in the downtown area of the cities, the lack of economical and convenient parking provisions in the central shopping district,

<sup>11</sup>Neil Harris, “American Space: Spaced Out of the Shopping Center,” *The New Republic*, December 13, 1975, p. 23; Eugene J. Kelley, *Shopping Centers: Locating Controlled Regional Centers*, (Saugatuck, Conn.: The ENO Foundation for Highway Traffic Control), 1956, p. 2; David J. Rachman, *Retail Strategy and Structure*, (Edgewood Cliffs, N.J.: Prentice Hall) 1975, p. 75; C. Winston Borgen, *Learning Experiences in Retailing*, (Pacific Palisades, Ca.), 1976, p. 55.

<sup>12</sup>Neil Harris, *supra*, note 11, pp. 23-24; Gurney Breckenfeld, *supra*, note 10, p. 82; Eric Peterson, “Shopping Centers: The Role Centers Must Play,” *Shopping Center World*, July, 1976, p. 10; “Important Facts About Shopping Centers—Main Street, U.S.A.,” *International Council of Shopping Centers Newsletter*, January, 1975, No. 3; “How Shopping Malls Are Changing Life in the U.S.,” *U.S. News and World Report*, June 18, 1973, p. 43; “Right Now,” *McCalls*, January 1973, p. 61.

and changed consumer buying habits.”<sup>13</sup> In other words, shopping centers were conceived to serve as the community centers of the developing suburbs because the cities were inadequate for the task.

Shopping centers have in turn fostered suburban development. A notable example is Eastridge Mall, a super-regional center situated approximately ten miles southeast of downtown San Jose. Eastridge was developed, and is owned and operated, by the Taubman Company, which has filed a Brief *Amicus Curiae* herein. When it opened in 1972, city planners predicted that Eastridge would pull the future growth of San Jose in its direction.<sup>14</sup> According to an Eastridge developer, “The old retail concept was to follow the growth of an area . . . what we’re trying to do is make the growth follow us.”<sup>15</sup>

The California Supreme Court had these same references made to it by appellees at the state level. That court also had the ability to take judicial notice of the area’s growth so as to witness that growth has indeed followed the center.

Whether the suburb begets the shopping center or vice-versa, the shopping center is the focal point for the suburban community in California. According to the *San Francisco Chronicle*, one of the state’s leading daily newspapers, shopping centers are “the common denominator of the suburban California lifestyle . . . where people go to

<sup>13</sup>Eugene J. Kelley, *Shopping Centers: Locating Controlled Regional Centers*, (Saugatuck, Conn.: The ENO Foundation for Highway Traffic Control), 1956, p. 2.

<sup>14</sup>Gurney Breckenfeld, “Downtown Has Fled to the Suburbs,” *Fortune*, October 1972, p. 85.

<sup>15</sup>“Shopping Centers Grow Into Shopping Cities,” *Business Week*, September 4, 1971, p. 36.

bank, buy a house, buy groceries and clothes, fix the car, make travel plans, see a lawyer, groom the dog, check their eyes, dine out, drink, dance, see a movie or meet a friendly stranger." (*San Francisco Chronicle*, June 28, 1976, p. 1)

## VI.

### THE SHOPPING CENTER HAS BEEN A PRINCIPAL CONTRIBUTING CAUSE TO THE DEMISE OF TRADITIONAL PUBLIC FORUMS.

An examination of changing socio-economic patterns reveals that shopping centers have played a major role in the decline of the public shopping district, and the town center in general. Previously discussed observations as to the evolution of the shopping center in the 1950's, and as to their role as community centers, both in following suburban expansion and in encouraging it, support this contention.

In addition, there is evidence related to modern business practices which demonstrates that shopping center owners and developers have actively sought to capture the market that historically patronized those establishments which made the public areas effective forums.

Expert evidence at trial revealed that the entrepreneurs of Santa Clara County are dedicated to "a newer marketing concept" of "total consumer orientation." (A. 34) Emphasis is placed on serving a market, not on selling a product. (A. 62) Following the philosophy of serving the people where they live and where they are willing to go, "Businessmen have found that people are willing to shop and spend a significant amount of their time in shopping centers . . . providing that their wants and needs are

satisfied." (A. 62) This last provision, it was noted, has been met in that "the shopping center complexes provide the location, the availability of goods and services and thus the satisfaction of consumer wants and needs." (A. 62)

Shopping centers have brought to California's suburban communities all of the goods and services that previously drew the public to the central business district. Then, by virtue of their convenience, more efficient use of space, and other advantages they offer, shopping centers captured the suburban market, the great majority of the population.<sup>16</sup> Retail theorists and developers have thus kept abreast of consumer psychological development spurred by social changes by offering shopping centers to suburbanites as a more rational choice than the central business district.

The deterioration of retail outlets is not limited to the downtown areas. The private control of shopping centers and the appeal they hold for shoppers has also had a devastating effect on independent merchants located in the suburbs. Unable to compete with the compartmentalized selection and convenience of the shopping center, and unable to afford rent or otherwise acquire space in a center, it has been predicted that the small independent merchants will eventually disappear from the suburbs as well as the central business district.<sup>17</sup>

<sup>16</sup>Gurney Breckenfeld, "Downtown Has Fled to the Suburbs," *Fortune*, October 1972, P. 80-82; "How Shopping Malls are Changing Life in the U.S." *U.S. News and World Report*, June 18, 1973, p. 43; C. Winston Borgen, *Learning Experience in Retailing* (Pacific Palisades, Ca.), 1976, p. 55.

<sup>17</sup>Rose De Wolf, "Main Street Goes Private," *The Nation*, December 18, 1972, p. 627.

The conclusion drawn from this discussion of the nature and effect of shopping center marketing is that the very economic principles and social conditions acted upon by shopping center developers, which have led to the success of their enterprises, were also instrumental in drawing away the market and the people from the traditional public districts. In drawing away that market, the shopping centers have drawn to themselves our essential forums.

## VII.

### SHOPPING CENTER OWNERS AND DEVELOPERS HAVE ENDEAVORED TO MAKE THEIR CENTERS THE HUB OF SUBURBAN COMMUNITIES, BOTH FOR THEIR OWN ECONOMIC GAIN AND IN REC- OGNITION OF THE COMMUNITY'S EXPECTATION THAT THEY PLAY THAT ROLE.

Extensive discussion of relevant socio-economic conditions and judicially noticeable observations concerning the shopping center industry is necessary primarily to place this Court in the same position of awareness as the State Court, which had been similarly briefed.

This type of brief is also compelled by the unsupported allegations of an *amicus curiae*, Homart Development Co., whose brief contains irrelevant factual contentions having no basis in the record.

To the extent Homart's allegations are not supported by cited sources, and to the extent they concern issues unrelated to orderly speech and petitioning in California shop-

ping centers, Homart's *amicus* brief should not be considered.<sup>18</sup>

Furthermore, as shown herein, Homart's general proposition that shopping centers are inappropriate locations for the conduct protected in California does not accurately state the industry's position, or even Homart's extrajudicial representations.

The argument that shopping centers are not equipped to serve as a forum for the students' protected conduct does not withstand logic or reality.

Logically, if shopping centers were not equipped to serve as forums, there would be no dispute, since there would be no interest in using them as such. Furthermore, logic dictates that the public presence in shopping center common areas renders such areas ideally equipped to serve the protected function.

In reality, shopping centers have not only displaced the streets and sidewalks of the central business district, they

<sup>18</sup>Appellees urge the court not to be influenced by Homart's distorted presentation of the situation at pages 3-4 of that company's brief. The purpose of an *amicus curiae* is to assist the court in determining the issues before it. That purpose is not served in this case by raising questions as to a possible extension of the State Court's reasoning to non-shopping center facilities such as "department stores, discount houses, stores with leased departments or concessions, multi-story buildings," smaller businesses and private residences. Nor is the case about union picketing, regardless of its location. (Brief of Homart Development Co., p. 4) Furthermore the Pruneyard is not a local neighborhood center (Homart Brief, p. 3), but rather a specialty center, and actually a regional center by virtue of its size and trading area (A. 37). Appellees submit that Homart's allegations are pretentious and unfounded. Should any of the issues ever be raised in California, they can be adjudicated in State Court with ultimate review at this level. But it is clear that in this case such issues are not in controversy.



have also actively sought to become centers of the community. According to a leading publication dealing with the shopping center industry, the general consensus of that industry's leaders is that "while the shopping center was conceived as a retail/commercial entity, it has today taken on the additional burdens of supplying entertainment, services, community spirit, and the like, and has evolved into something which provides the townsfolk with a place to 'hang out'."<sup>19</sup>

According to the same source, "The industry very much accepts its position in the community and indeed is searching for new and better ways to contribute, if for no other reason than anything the shopping center can provide to the community almost invariably comes back in the form of higher sales volume."<sup>20</sup>

The International Council of Shopping Centers, which also has filed an *amicus* brief herein, recognizes that centers have become "socially responsive members of the community." That body further notes that the malls of shopping centers are "the leisure time meeting place for young and old alike," and that "time spent in shopping centers by all age groups ranks only behind time spent on the job and at home."<sup>21</sup>

<sup>19</sup>Eric Peterson, "Shopping Centers: The Role Centers Must Play," *Shopping Center World*, July 1976, p. 10.

<sup>20</sup>Peterson, *supra*, pp. 10-11.

<sup>21</sup>"Important Facts about Shopping Centers—Main Street, U.S.A.," *International Council of Shopping Centers Newsletter*, January 1975, No. 3, citing "How Shopping Malls are Changing Life in the U.S.," *U.S. News and World Report*, June 18, 1973.

According to the International Council of Shopping Centers, "Thousands of activities take place each week across the land which instruct, entertain, contribute to charitable causes and the public welfare, and add to the cultural life of the community."<sup>22</sup> Among the activities referred to by the International Council of Shopping Centers are musical concerts, health education programs and clinics, religious services, fashion shows, charity drives, and auto shows.<sup>23</sup>

Political candidates have turned to shopping centers, recognizing them to be the gathering places of the communities.<sup>24</sup>

Leaders of the shopping center industry agree that their establishments are the nuclei of the sprawling suburbs—that they fill a void that has traditionally been occupied by the downtown area and other public centers. In the published words of a representative of Homart Development Company:

"The suburban shopping mall is the sociological center of activity in an area where there is no other magnet. Human need to see and be seen is fulfilled."<sup>25</sup>

<sup>22</sup>"Important Facts About Shopping Centers—Main Street, U.S.A.," *International Council of Shopping Centers Newsletter*, January 1975, No. 3.

<sup>23</sup>*Ibid.*

<sup>24</sup>Gurney Breckenfeld, "Downtown Has Fled to the Suburbs," *Fortune*, October 1972, p. 82.

<sup>25</sup>Bob Moor of Homart Development Co., in Eric Peterson, "Shopping Centers: The Role Centers Must Play," *Shopping Center World*, July 1976, p. 10.

## VIII

**SHOPPING CENTERS ARE ESPECIALLY CHARACTERISTIC OF CALIFORNIA COMMUNITIES WHERE THEIR DEVELOPMENT PARALLELED THAT OF GENERAL SOCIAL PATTERNS. SHOPPING CENTERS IN CALIFORNIA ARE THUS AN INTEGRAL PART OF THE STATE'S SOCIAL PATTERN.**

Shopping centers are especially characteristic of California society. Neil Harris, professor of history at the University of Chicago, has observed that "(e)arly shopping centers . . . developed in California during the 1920's and 1930's. Living in the first set of urban communities built entirely around the automobile, Californians quickly discovered the advantages of placing groups of stores around or within parking areas."<sup>26</sup>

It was during the 1950's that shopping center development accelerated its pace, making its move toward the status it now enjoys in the suburban lifestyle. The development rates further increased in the 1960's.<sup>27</sup>

These same time periods mark the westward migration of the millions of Americans who settled in California. Santa Clara County is representative of the pattern of the state's development. The population of the county increased fourfold between 1950 and 1975, going from 290,547 to 1,293,400. (Clerk's Transcript of State Court Record, p. 59) 71 percent of that gain is attributable to immigration (A. 54). As of 1970, 92.2 percent of the total North County

<sup>26</sup>Neil Harris, "American Space: Spaced Out of the Shopping Center," *The New Republic*, December 13, 1975, p. 23.

<sup>27</sup>"Important Facts about Shopping Centers—Main Street U.S.A.," *International Council of Shopping Centers Newsletter*, January 1975, No. 3.

population (1,034,190) lived outside the central San Jose planning area, i.e., in the suburbs or rural areas (A. 56). This fact was expressly recognized by the highest state court. (J.S.App. C-8). This is in great contrast with the national pattern of distribution in which only 40 percent of the people lived in suburbs in 1972.<sup>28</sup>

This predominantly suburban lifestyle, coupled with the early rise of shopping centers in conjunction therewith, indicates that in California, perhaps more than anywhere else, the shopping center is engrained in the social pattern. Centers have not only displaced the town centers in California, they are historically the original nuclei of many firmly established suburban communities, the only public assembly point they have ever known. To such people, the central business district was never central, but remote.

The California Supreme Court has recognized the important position of shopping centers in that state. In that Court's view, based on the record, relevant publications, and common knowledge within the state, California shopping centers are essential and invaluable forums for the conduct at issue—and individuals and the general public would suffer irreparable injury if certain fundamental attributes of public presence are not protected from inequitable restriction.

In *Lloyd v. Tanner*, 407 U.S. 551, this Court held that the state action component of First Amendment protection was not present in the shopping center context. The Court stated that the shopping center does not lose its

<sup>28</sup>Rose DeWolf, "Shopping Centers: Main Street Goes Private," *The Nation*, December 18, 1972, P. 626.

private character "merely because the public is generally invited to use it for designated purposes."

Article I, Sections 2 and 3 of the California Constitution are not limited in scope and application by the presence of state action. The State's Constitution, unlike its federal counterpart, is primarily intended to establish and preserve the rights and interests of individuals in its jurisdiction, not only as against the state, but as to each other.

This difference in the respective constitutions is an inherent ingredient of federalism. Disputes between individuals, and classes of individuals, within a state, are wisely assigned to state courts for resolution with an eye toward local need and circumstance. *Lloyd's* test for First Amendment protection does not prevent the individual states from protecting state-created rights that are more expansive than those under the First Amendment, especially when the social context of the state issue may not exist nationwide.

Nor can it reasonably be said that California shopping centers are open for the "designated purposes" of the center in *Lloyd*.

Even if the primary purpose of the Pruneyard, or any shopping center, is commercial, the state court has recognized that in reality the common areas of centers are not so designated. These areas are in fact used for pedestrian traffic, public gathering, and relaxation in the midst of, but not in, commercially designated facilities. (See discussion, *supra*, and Sections V and VII, *supra*.)

In contrast to the facts presented in *Lloyd*, it has been shown in this case, both here and in the court below, that

one of the major "designated purposes" of the shopping center has been to displace the central business district. In California, moreover, shopping center development has eliminated the need to build public shopping areas to serve suburban communities. It has also been shown that it is a designated purpose of shopping centers to assume the role of the community center, the focal point to which members of the public turn for social, economic, cultural, political and recreational needs.

"The key word . . . ' says James W. Rouse of Rouse Company, one of the largest developers, 'is completeness—the integration of all of the retail and commercial functions of modern life and the activities that people are involved in: entertainment, recreation, health, shopping, eating and education.'"<sup>29</sup>

It is requested that this Court either uphold or decline to review the decision of the California Supreme Court. That court's judgment is well founded in law, does not violate the Pruneyard's federal rights, and represents an adjustment of rights for the common good that fairly and justly protects both parties.

Dated, January 30, 1980.

Respectfully submitted,

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<sup>29</sup>Rose DeWolf, "Main Street Goes Private," *The Nation*, December 18, 1972, P. 626.



Supreme Court, U.S.  
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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1979

RODAK, JR., CLERK

**No. 79-289**

PRUNEYARD SHOPPING CENTER AND FRED SAHADI,  
*Appellants,*

v.

MICHAEL ROBINS, ET AL.,  
*Appellees.*

On Appeal From the Supreme Court  
of the State of California

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IN THE  
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**I. THE TAKINGS CLAUSE AND THE FIRST AMENDMENT ARE PROPERLY BEFORE THIS COURT AS SOURCES OF THE CENTER OWNER'S RIGHT TO PROHIBIT APPELLEES FROM SOLICITING PETITION SIGNATURES ON THE PREMISES OF THE PRUNEYARD.**

Appellees now contend that this Court is without jurisdiction to consider what they style "the taking issue" or to consider whether the action of the court below violates the Center owner's First Amendment rights, asserting that neither argument was properly



raised in the state courts.<sup>1</sup> In so contending, appellees misconstrue the record in the present case and the precedents of this Court.

**A. The PruneYard and Its Owner Relied At Every Stage Upon Their Property Rights as Recognized in *Lloyd v. Tanner*. As *Lloyd v. Tanner* Made Clear, the Takings Clause Is a Source of the Property Rights of a Shopping Center Owner.**

This case was not brought by the State of California as a condemnation case. Nor was it brought by Mr. Sahadi, the owner of PruneYard Shopping Center ("Center"), to challenge a property regulation as an "inverse condemnation." Rather, it was brought by appellees to compel Mr. Sahadi to furnish the Center as a forum for their petitioning. All parties knew from the outset that the governing cases were *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), and *Diamond v. Bland*, 11 Cal. 3d 331 (1974) (*Diamond II*), in which the California Supreme Court followed *Lloyd v. Tanner*. *Lloyd v. Tanner* explicitly described the source of the private property rights of a shopping center owner as including the Due Process Clauses of the Fifth and Fourteenth Amendments and the Fifth Amendment proscription "against the taking of 'private property . . . for public use, without just compensation.'" 407 U.S. at 567. Thereafter, the Court made shorthand reference to "the Fifth and Fourteenth Amendment rights of private owners", 407 U.S. at 570, a reference which can only reasonably be understood as including the Takings Clause. In short, *Lloyd v. Tanner* did not fragment constitutionally protected property rights in so minute or artificial a manner as appellees now suggest.

<sup>1</sup> Brief of Appellees at 26-29.

Thus the "taking issue" has been with the parties and the courts literally from the beginning of this case. Frequent references to private property rights protected under *Lloyd* or *Diamond II* appeared at every stage of the proceedings, references which under the language of *Lloyd* must be read to refer to all of the property rights emanating from the Fifth and Fourteenth Amendments, including the Takings Clause. *Lloyd v. Tanner*, 407 U.S. at 567. In the Superior Court, appellees themselves first raised the question in their Memorandum of Points and Authorities in Support of Application for Preliminary Injunction, by quoting a passage from *Lloyd* which includes the phrase "unwarranted infringement of private property rights."<sup>2</sup> At oral argument, counsel for the Center began his opening statement by arguing that this case is not different from "a United States Supreme Court case, the *Lloyd Center* case, which has been cited in our briefs."<sup>3</sup> And the Superior Court's Findings of Fact and Conclusions of Law were framed in terms drawn from *Lloyd*. For example, the Superior Court found that "There has been no dedication of the CENTER's property to public use, such as to entitle plaintiffs to exercise the asserted First Amendment rights."<sup>4</sup>

In the Court of Appeal, appellees themselves framed the issue of the case by stating that "This case poses a conflict between appellants' rights of speech and petition under the First Amendment to the Constitution

<sup>2</sup> Memorandum of Points and Authorities in Support of Application for Preliminary Injunction at 4, March 30, 1976.

<sup>3</sup> Reporter's Transcript on Appeal at 8.

<sup>4</sup> J.S. App. A-2. Compare *Lloyd v. Tanner*, 407 U.S. at 570.

of the United States and respondents' private property rights under the 14th Amendment."<sup>5</sup> In response, the Center and its owner argued extensively that the owner's private property rights must prevail over the First Amendment rights of appellees under the test formulated in *Lloyd, Diamond II*, and *Hudgens v. NLRB*, 424 U.S. 507 (1976).<sup>6</sup> The Court of Appeal affirmed the judgment of the Superior Court, relying upon *Diamond II*. J.S. App. B-11.

Appellees' Petition for Hearing in the California Supreme Court articulated the operative test under *Lloyd* and *Diamond II* to be in part "whether such rights of the individual and of the public, outweigh the private property rights of the land owner [sic] . . . ." In a subsequent brief, they discussed the entire nexus of Fifth and Fourteenth Amendment property rights, explicitly including the Takings Clause.<sup>7</sup> The Center owner likewise argued extensively with respect to his federally protected property rights.<sup>8</sup>

The California Supreme Court took full, explicit cognizance of the reliance of the PruneYard and its

<sup>5</sup> Appellants' Opening Brief in the Court of Appeal, First Appellate District, Division Four at 6, April 6, 1977.

<sup>6</sup> Brief for Respondents in the Court of Appeal, First Appellate District, Division Four at 11-18, June 3, 1977.

<sup>7</sup> Petition for Hearing before the California Supreme Court at 8, February 8, 1978.

<sup>8</sup> Brief of Appellants in Response to Brief of *Amicus Curiae* Taubman Company, Inc., and Other Briefs Filed Herein at 6-7, July 9, 1978 (filed in the California Supreme Court).

<sup>9</sup> Brief in Response to *Amicus Curiae* Brief of People's Lobby at 17-20, May 2, 1978; Brief in Response to *Amicus Curiae* Brief at 27-35, July 10, 1978 (filed in the California Supreme Court).

owner on their Fifth and Fourteenth Amendment property rights. In subordinating those property rights to its novel interpretation of the California Constitution, the court below addressed and rejected the contention that "*Lloyd* . . . recognized identifiable property rights under the Fifth and Fourteenth Amendments." J.S. App. C-3, 23 Cal. 3d at 903.

This Court has instructed that a federal claim need not be raised in state court in any particular, talismanic way:

"No particular form of words or phrases is essential, but only that the claim of invalidity and ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented."

*New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). As the record set forth above reflects, the taking argument was in fact brought to the attention of the state courts "with fair precision and in due time."

The cases cited by appellees only confirm this Court's jurisdiction. In *Street v. New York*, 394 U.S. 576 (1969), the defendant argued that a New York statute making it a crime to defy or cast contempt upon the American flag by words alone violated the First Amendment by reason of overbreadth. The test for determining proper presentation was "whether [the] question was presented to the New York courts in such a manner that it was necessarily decided by the New York Court of Appeals when it affirmed ar-



pellant's conviction." 394 U.S. at 581-82. This Court held that counsel's recitation of the offending words, together with references to "the First Amendment of the United States Constitution" and "the New York State Constitution on freedom of speech," were adequate to raise the issue. 394 U.S. at 582-83.

In *Cardinale v. Louisiana*, 394 U.S. 437 (1969), this Court dismissed a writ of certiorari seeking constitutional review, citing "petitioner's admitted failure to raise the issue he presents here in any way below." 394 U.S. at 439. In the present case, the Center owner's reliance on *Lloyd* subsumed the taking argument, clearly affording the California Supreme Court a full opportunity to pass upon the constitutionality of its revised interpretation of the California Constitution.<sup>10</sup>

**B. The Contention That the First Amendment Is a Source of the Right of the PruneYard and Its Owner to Prohibit Petitioning Was Properly Presented to the California Supreme Court.**

In the California Supreme Court, the Center owner raised and relied upon his First and Fourteenth Amendment right to control the use of his property for expressive purposes, stating, for example, that

"The Constitutional right to exclude potential communicants from private property . . . which has been recognized as deriving from the owner's status as an owner, also derives from the owner's

<sup>10</sup> *Tacon v. Arizona*, 410 U.S. 351 (1973), also cited by appellees, has no bearing on this case. The constitutional question involved there was a state's authority to try in absentia a criminal defendant who left the state and was unable for financial reasons to return. This Court held that neither that constitutional question, any other constitutional question, nor indeed, any other related question of law had been raised below. 410 U.S. at 352.

status himself as a potential communicant. Defendant urges that his constitutional right to free speech would be infringed if he were required to make his property available to others for the purpose of their expressive activity."<sup>11</sup>

The Center owner raised the issue again in his Petition for Rehearing,<sup>12</sup> and appellees responded on the merits to the argument.<sup>13</sup> The argument was properly raised under state procedure and this Court's decisions, was implicitly rejected by the California Supreme Court, and is now properly before this Court.

It is of no consequence to this Court's jurisdiction that the argument was first raised in the California Supreme Court, as an alternative ground of affirmance. As a matter of California procedure, "it is settled that a change in theory is permitted on appeal when 'a question of law only is presented on the facts appearing in the record. . . .'" *Ward v. Taggart*, 51 Cal. 2d 736, 742 (1959), quoting *Panopulos v. Maderis*, 47 Cal. 2d 337, 341 (1956).<sup>14</sup> The constitutional argument regarding the Center owner's First and Fourteenth Amendment rights contemplated no issue of fact left unsettled or disputed at trial.<sup>15</sup>

<sup>11</sup> Brief in Response to *Amicus Curiae* Briefs at 39, July 10, 1978. See generally *id.* at 35-42.

<sup>12</sup> Petition for Rehearing at 3-4, April 16, 1979.

<sup>13</sup> Answer to Petition for Rehearing at 4-5, April 30, 1979.

<sup>14</sup> See also *UFITEC, S.A. v. Carter*, 20 Cal. 3d 238, 249 n.2 (1971); *Burdette v. Rollefson Construction Co.*, 52 Cal. 2d 720, 725, 726 (1959).

<sup>15</sup> Where it has denied the right to raise new points on appeal, the California Supreme Court has justified its decision by explicit-



Thus, as a matter of California procedure, the Center owner's raising of his First Amendment argument for the first time on appeal to the state supreme court was proper and timely. In fulfillment of the requisites of this Court, the California Supreme Court was given the first opportunity to consider questions of the constitutionality of a state statute. *Cardinale v. Louisiana*, 394 U.S. at 439. In addition, the silence of the California Supreme Court does not affect this Court's ability to review the question. While a decision by a state court is required for review by this Court, "it is not necessary that the rule shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. at 67; see also *Street v. New York*, 394 U.S. at 581-82. By applying the California Constitution to require access to the Center for expressive purposes, the California Supreme Court implicitly and necessarily abrogated the First and Fourteenth Amendment rights of the owner to control expressive use of the premises.<sup>16</sup>

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ly specifying the new factual basis contemplated by the new theory. See, e.g., *Gyerman v. United States Lines Co.*, 7 Cal. 3d 488, 499-500 (1972). No such new factual basis was contemplated here. The Superior Court specifically found that the Center's policy prohibited all handbilling and circulation of petitions. Superior Court Findings of Fact, J.S. App. A-2. Decision of the California Supreme Court, J.S. App. C-1, 23 Cal. 3d at 902.

<sup>16</sup> The California appellate doctrine of the law of the case by analogy provides some guidance for the determination of whether a given point has been impliedly decided on appeal. In determining whether a point has been impliedly decided, the California Supreme Court has held, for example, that the mutuality of obligation of a contract was decided in an earlier appellate opinion which made no mention of mutuality or indeed even of contract validity. *Steelduct Co. v. Henger-Seltzer Co.*, 26 Cal. 2d 634, 642-43 (1945).

Moreover, when the highest court of a state, as in this case, renders an unexpected interpretation of state law or reverses its prior interpretation, a federal question raised for the first time even in a petition for rehearing in the state court is timely presented.<sup>17</sup> In *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930), for example, the Supreme Court of Missouri reversed its prior interpretation of a state statute governing the powers of the state tax commission. This Court held that a federal due process challenge presented for the first time in a petition for rehearing was "timely" presented to the Supreme Court of Missouri and thus was properly before this Court. A party is not "bound to anticipate a construction of the highest state court." *Missouri ex rel. Missouri Insurance Co. v. Gehner*, 281 U.S. 313, 320 (1930).

In the present case, the Center owner argued in the Superior Court and the Court of Appeal that *Lloyd* and *Diamond II* were controlling, and both courts so held. It was not until the California Supreme Court ventured its new view of the state constitution that the Center owner could reasonably have seen the need to raise a federal First Amendment challenge, or indeed any federal constitutional challenge, to that interpretation. In fact, he raised the issue before the decision in the California Supreme Court, against the possibility that the court had granted review to re-examine *Diamond II*. Thus, the First and Fourteenth Amendment argument was raised prior to the overturning of recent definitive precedent and in more than "due

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<sup>17</sup> *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 677-78 (1930); *Missouri ex rel. Missouri Insurance Co. v. Gehner*, 281 U.S. 313, 320 (1930); *Saunders v. Shaw*, 244 U.S. 317, 320 (1917).

time." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. at 67.

**II. A DECISION IN FAVOR OF THE CENTER OWNER WOULD NOT THREATEN THE CONSTITUTIONALITY OF THE FEDERAL CIVIL RIGHTS LAWS OR THE NATIONAL LABOR RELATIONS ACT.**

The United States as *amicus curiae* would have it that the Center owner can prevail only if property rights are absolute and, in that event, that two major civil rights acts and the National Labor Relations Act may be unconstitutional.<sup>18</sup> Their argument dresses a straw man as a scarecrow.

The rights of a shopping center owner are no more absolute than the rights of other property owners. This Court has recognized that Congress may, under the commerce clause, order access to private property in order to put an end to racial discrimination. *See e.g., Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). Similarly, Congress may order access to private property under narrowly defined circumstances to foster the important national goal of furthering industrial peace. *See, e.g., NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). Property rights, like other constitutional rights, may be forced to yield to competing rights in proper circumstances. The strength of the state interest involved in a particular case will affect the power of the state or of Congress to infringe upon a property owner's right to exclude unwanted guests from his property. When a state interest is strong and cannot be served by any means less drastic than an invasion of a property

<sup>18</sup> Brief for the United States as *Amicus Curiae* at 2-3, 17-18. *See also* Brief of Appellees at 23-24.

right, the property right may be forced to yield. Thus, the national interest in assuring racially nondiscriminatory access to public accommodations could not be served without forcing a motel or restaurant owner to receive all guests regardless of race. *Heart of Atlanta Motel, supra*. That property rights must yield to other rights in some circumstances is self-evident. But the issue here is whether, under the circumstances of this case, the rights of the shopping center owner must be surrendered to the state interest, asserted here, in the use of shopping centers as public forums. On this specific issue, *Lloyd v. Tanner* is dispositive.

*Lloyd* rested on alternative holdings (1) that the action of the shopping center in excluding the handbillers was not state action because the shopping center was not the functional equivalent of a municipality and (2) that constitutional property rights of shopping center owners prevail over even the First Amendment rights of speakers when the speakers have other adequate alternative forums for expressions. The second holding controls here.

*Hudgens v. NLRB*, 424 U.S. 507 (1976), unequivocally reaffirmed *Lloyd's* state action holding and did not, despite appellees' suggestion to the contrary, disturb *Lloyd's* property rights holding. That property rights holding remains controlling when speakers, handbillers, or petitioners claim a right of access under state law.

Appellees take comfort from Mr. Justice Stewart's statement in *Hudgens* that that case should be decided "exclusively upon [section 7 of] the National Labor Relations Act." 424 U.S. at 521. But this Court, in interpreting section 7, has long recognized that the



balancing process under section 7 is mandated precisely because unlimited union access to private property would constitute an "unwarranted infringement of long-settled rights of private property protected by the Fifth and Fourteenth Amendments." *Central Hardware Co. v. NLRB*, 407 U.S. 539, 547 (1972).

The reasons for reaffirming the balance struck by *Lloyd* are as compelling in this instance as the reasons propounded by appellees for changing that balance are insubstantial. *Lloyd* instructs that where the property owner's rights can be protected without significantly impinging upon asserted rights of speech, they must be protected. Appellees suggest that the protection of the rights of both the owner and the speakers was not possible here because "the students knew that publicly owned areas of downtown San Jose and neighboring municipalities were inadequate" for their purposes.<sup>19</sup> Whatever the students thought they knew, the Superior Court specifically determined that they had adequate alternative avenues of communication,<sup>20</sup> making possible accommodation of their interests without sacrificing Mr. Sahadi's constitutional rights.

Appellees also belabor the sociological data ostensibly supporting the decision below, and augment it with miscellaneous quotations from trade journals of the shopping center industry.<sup>21</sup> The same arguments about the special character of shopping centers were

<sup>19</sup> Brief of Appellees at 7.

<sup>20</sup> J.S. App. A-3.

<sup>21</sup> Brief of Appellees at 47-59.

made in Mr. Justice Marshall's *Lloyd* dissent, 407 U.S. at 580-81, and rejected by the majority.

"In terms of being open to the public, there are differences only of degree—not of principle—between a freestanding store and one located in a shopping center, between a small store and a large one, between a single store with some malls and open areas designed to attract customers and Lloyd Center with its elaborate malls and interior landscaping."

407 U.S. at 565-66.<sup>22</sup>

### III. THE CENTER OWNER'S RIGHTS HAVE MULTIPLE SOURCES IN THE CONSTITUTION.

Appellees fragment the constitutional rights of a property owner. These rights rest on a number of constitutional sources, each of which separately protects property owners against different forms of encroachment by the state, and which, when viewed together, unquestionably prevent *this* state-mandated infringement of Mr. Sahadi's rights.

The Takings Clause, through the Due Process Clause of the Fourteenth Amendment, protects against state encroachments on property interests by condi-

<sup>22</sup> Indeed, these arguments applied with greater force to the center in *Lloyd* than they do to the PruneYard. If ever a shopping center had achieved the status of substitute for the traditional downtown shopping area, it was the center involved in *Lloyd*. The Lloyd Center was, in the parlance of the shopping center industry, a "super-regional" center situated on 50 acres of land, designed as a "multilevel complex of buildings, parking facilities, submalls" with all the predictable accoutrements. 407 U.S. at 571. In contrast, the PruneYard is a specialty center occupying only 21 acres of land. J.S. App. C-1, 23 Cal. 3d at 902.



tioning the state's power to regulate property in certain ways upon the payment of compensation to affected property owners. The Center owner does not here contend that the Superior Court should have awarded compensation for a taking of his property; rather he contends, as this Court in *Lloyd* recognized, that the Takings Clause was a source of the Fifth and Fourteenth Amendment rights of private property owners that must be balanced against any state interest purporting to justify state-coerced trespass on private property. 407 U.S. at 567.

As the decision this term in *Kaiser Aetna v. United States*, No. 78-738, 48 U.S.L.W. 4045 (Dec. 4, 1979), reemphasized, this Court has been especially careful to protect the property owner's right to control access to and use of his property. Whatever the scope of the government's power to diminish other incidents of property ownership without paying compensation—such as the right to develop affected by the regulation in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), or the right to put property to any conceivable use affected by the zoning ordinance at issue in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), it is clear that this Court views the extent of "physical invasion by government" of the owner's land as especially telling evidence that a taking has occurred. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). Here, the California Supreme Court has compelled Mr. Sahadi to admit unwanted solicitors on to his property. Whether Mr. Sahadi could establish in another proceeding that the Court's order below amounted to a taking is beside the point. The constitutional protection the Takings Clause provides for property owners against state ac-

tion that deprives these owners of the core incidents of property ownership is, as *Lloyd* recognized, but a source, and but one source, of the protection the Constitution affords the property owner against state interference undertaken in the interest of fostering speech.

The Due Process Clause is another source of the property owner's protection from the state. Once a state has created a property right, it may not arbitrarily deprive the citizen of that right, whether the deprivation is caused by arbitrary substantive actions or by arbitrary procedures that deprive the property owner of his interest. Although for procedural due process purposes, a citizen is entitled to protection from arbitrary deprivation of his property by the state only if the interest of which he is deprived has some source in state property law,<sup>23</sup> it certainly does not follow that the state may, in the name of any available state interest, avoid due process scrutiny of its actions simply by labeling all its actions affecting property as simple redefinitions of property. A state would not free its actions from due process scrutiny simply by declaring that henceforth property ownership did not include the right to control access. The deprivation of such a preexisting property right would entitle the affected owner to review of the state's action under the Due Process Clause.<sup>24</sup>

Finally, the First Amendment provides the property owner with protection against state law that would force him to place his property at the service of the

<sup>23</sup> See, e.g., *Bishop v. Wood*, 426 U.S. 341 (1976).

<sup>24</sup> See Monaghan, Of "Liberty" and "Property", 62 *Cornell L. Rev.* 405, 434-35 (1977).

state's idea of proper, good, beautiful, or socially useful speech. Appellees attempt to denigrate this source of the owner's rights by noting that some patrons of the PruneYard may wear political or other buttons while shopping at the Center. The conduct of persons permissibly on the PruneYard's premises is not relevant to the rights of unwanted guests to use the machinery of the state to compel access to the PruneYard. As the majority opinion in *Lloyd* noted, the shopping center involved in that case regularly permitted some speakers to use the center as a forum. 407 U.S. at 555. Nor does it matter that the PruneYard would welcome the appellees as customers. Certainly a homeowner may invite a guest to come to dinner but not to put political signs on his front lawn. And the scope of a restaurant owner's invitation to the public need not extend to allowing the distribution of handbills among the tables. Should the state compel the owner to tolerate the guest's speech activities, that state compulsion would run afoul of the owner's First Amendment right to remain silent, and to exclude

those whose actions interfere with that right. That is exactly what the California Supreme Court has done here.

Respectfully submitted,

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Dated: March, 1980

FEB 2 1980

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**In the Supreme Court of the United States**

OCTOBER TERM, 1979

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PRUNYARD SHOPPING CENTER, ET AL., APPELLANTS

v.

MICHAEL ROBINS, ET AL.

---

ON APPEAL FROM THE SUPREME COURT  
OF THE STATE OF CALIFORNIA

---

BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE

---

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**In the Supreme Court of the United States**

OCTOBER TERM, 1979

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No. 79-289

PRUNYARD SHOPPING CENTER, ET AL., APPELLANTS

*v.*

MICHAEL ROBINS, ET AL.

---

ON APPEAL FROM THE SUPREME COURT  
OF THE STATE OF CALIFORNIA

---

BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE

---

**QUESTION PRESENTED**

Whether state constitutional provisions protecting the reasonable exercise of speech and petition rights on the property of privately-owned shopping centers to which the public is invited violate the property rights under the Fifth and Fourteenth Amendments or the free speech rights under the First and Fourteenth Amendments of shopping center owners who



wish to prohibit all non-business-related petitioning on their property.

#### INTEREST OF THE UNITED STATES

The National Labor Relations Act, 29 U.S.C. 151 *et seq.*, which, *inter alia*, protects employees' right of self-organization, Title II of the Civil Rights Act of 1964, 42 U.S.C. 2000a *et seq.*, which prohibits discrimination on the grounds of race, color, religion, or national origin in the furnishing of public accommodations, and the Fair Housing Act of 1968, 42 U.S.C. 3601 *et seq.*, which prohibits discrimination on the grounds of race, color, religion, sex, or national origin in the sale or rental of most categories of dwellings, all confer rights on individuals that are inconsistent with the notion that the owner of a shopping center such as the one involved in the present case must be paid just compensation by any government whose laws require him to admit persons onto his property against his will. Although appellants do not claim any federal constitutional right to exclude persons on the basis of race, and although they concede (App. Br. 18-20) that this Court has recognized the existence of rights under the NLRA that sometimes require a shopping center owner to admit onto his property persons whom he would rather exclude, appellants nonetheless make an argument inconsistent with these implicit and explicit concessions. In particular, they argue (App. Br. 11-12) that the right to exclude "is such a central ele-

ment of private property that the government, even in the name of reasonable regulation, cannot diminish that right without paying compensation." In addition, appellants contend (App. Br. 13) that the First Amendment gives the owner of a shopping center a right to bar the use of his property "as a forum for the views of others"—a contention that is inconsistent with rights under the NLRA that appellants purport to recognize.

Because rights under the aforementioned federal statutes could be affected by the Court's decision in this case, the United States has an interest in filing this brief *amicus curiae*.

#### STATEMENT

1. Appellant PruneYard Shopping Center ("the Center") is a shopping center, owned by appellant Fred Sahadi, that occupies a 21-acre site in Campbell, California (J.S. App. A-1, B-1; A. 13).<sup>1</sup> A supermarket, a cinema and a number of specialty shops, restaurants, and banks do business there (*id.* at A-2, B-1). Although the Center is generally open to members of the public, neither visitors nor tenants are permitted to pass out handbills or to circulate petitions (*id.* at A-2).

On November 17, 1975, appellees, who are high school students, came to the Center to solicit signatures for a petition, to be sent to the White House in

<sup>1</sup> "J.S. App." refers to the appendix to the Jurisdictional Statement. "A." refers to the joint appendix to the briefs.

Washington, D.C., opposing a United Nations resolution against "Zionism" (*id.* at A-2, B-2). In carrying out this activity, they set up a card table in the Center's central plaza and asked passersby to sign their petition (*id.* at B-2). Their conduct was at all times peaceful and orderly, and their efforts were apparently well-received by the Center's patrons (*id.* at B-2). Soon after they began soliciting signatures, a uniformed security officer told them they were violating the Center's no-solicitation regulations (*ibid.*). Appellees left after speaking to another security officer, who told them they would have to leave, but suggested they might resume their activity on public sidewalks at the edge of the Center property (A. 27). Appellees sought to resume their petition effort at another privately-owned shopping center in the same county, but they were denied access for this purpose there as well (J.S. App. B-2).

2. Appellees filed suit in the Superior Court of California, County of Santa Clara, seeking to enjoin appellants from prohibiting them from soliciting signatures on their petitions on the Center's grounds. The court declined to grant the injunction (J.S. App. A-1 to A-3), and its judgment was affirmed by the Court of Appeal for the First Appellate District (*id.* at B-1 to B-11).

3. On appeal to the California Supreme Court, the judgment denying the injunction request was reversed (J.S. App. C-1 to C-20). The court concluded that appellees' petition effort was protected by Article I,

Sections 2 and 3 of the California Constitution, the liberty of speech and petition clauses in that Constitution.

The court rejected appellants' contention that this Court's decision in *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), compelled a holding that property rights of a shopping center owner protected under the Fifth and Fourteenth Amendments were paramount to speech and petition rights whenever public parks, streets, and the like are available for the exercise of the latter rights. Stating that *Lloyd* was "primarily a First Amendment case" that "did not purport to define the nature or scope of Fifth and Fourteenth Amendment rights of shopping center owners generally" (J.S. App. C-4), the court concluded that the broader and more definitive protection of speech and petitioning in the California Constitution could be vindicated only by permitting peaceful handbilling or solicitation of signatures at shopping centers under appropriate time, place, and manner rules (*id.* at C-9 to C-13). This was so, the court reasoned, because shopping centers had replaced central business districts as the location where large segments of the population were concentrated during the day (*id.* at C-7 to C-8, C-11 to C-13). Such a regulation of property in the public interest does not infringe property rights protected by the United States Constitution, the Court concluded (*id.* at C-5 to C-7, C-13).

## SUMMARY OF ARGUMENT

1. In *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), this Court held that the First and Fourteenth Amendments, which "safeguard the rights of free speech and assembly by limitations on *state action*" (407 U.S. at 567; emphasis in original), do not entitle persons to distribute handbills on the grounds of a privately-owned shopping center which is generally open to the public, where handbilling is prohibited by the center's owner. Although the Court referred to rights of property owners under the Fifth and Fourteenth Amendments, it did not decide whether such property rights would permit shopping center owners to prohibit handbilling and similar activities where statutory or state constitutional provisions going beyond the First Amendment protect those activities. Thereafter, in *Hudgens v. NLRB*, 424 U.S. 507 (1976), the Court held that the First Amendment did not protect certain labor picketing on the property if the shopping center owner objected to it, but it remanded the case to the National Labor Relations Board for a determination whether the picketing might be protected under the National Labor Relations Act, 29 U.S.C. 151 *et seq.* Just as *Lloyd* did not answer the question whether the picketing in *Hudgens* might be protected under the NLRA, so it did not strike any balance between property rights and rights of free expression that would preclude a state court from holding that a state law or constitutional provision validly authorizes indi-

viduals to circulate petitions and distribute handbills at privately owned shopping centers.

2. The California Supreme Court held that appellees were entitled to engage in orderly petitioning at the Center because the affirmative speech and petition guarantees in the California Constitution cannot be fully effectuated when suburban shopping malls like the Center, where large numbers of people congregate daily, are closed to such activities. In order to minimize any interference with the commercial functions of the Center, the court made it clear that the Center would be free to impose reasonable time, place, and manner rules on the petitioning. Under principles applied in this Court's decisions construing the Takings Clause of the Fifth Amendment and the correlative guarantee against deprivation of property without due process under the Fourteenth Amendment, that holding of the court below does not effect a taking of appellants' property.

Recognizing a right to distribute literature or to circulate petitions in an orderly manner at shopping centers open to the general public without charge (1) does not interfere with any "distinct investment-backed expectations" (*Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978)) of the owners; (2) does not permit a physical invasion of property that was intended to be kept private; and (3) does not benefit the government in any of its entrepreneurial functions. Moreover, the right recognized by the California Supreme Court and the



corresponding obligations placed on the owner of the shopping center represent a reasonable exercise of the police power. This limitation on owners' rights to exclude persons from their property does not differ in any essential way from restrictions imposed by zoning laws on owners' rights to build whatever they choose on their property or from obligations imposed by states on developers of residential subdivisions to dedicate portions of privately owned land to public use. State law is the definitional source of property rights in relation to the rights of others, and so long as the state's limitations on property rights are reasonably related to promotion of the public welfare and do not frustrate expectations for reasonable return on investment, they do not amount to a taking of property giving rise to a claim for compensation. The burden of proving unreasonableness is on the party asserting a taking, and in the present case appellants have not carried that burden.

3. Recognizing a right of access to shopping center property for the exercise of speech and petition rights under the California Constitution does not infringe the rights of the owners under the First Amendment. Unlike the requirement of the State in *Wooley v. Maynard*, 430 U.S. 705 (1977), that each owner of an automobile registered in the State display a state-prescribed motto on his license plate, the state constitutional provisions here merely require that property which is already open to the general public for shopping and strolling also be open

to persons who wish to express their views on various issues to the general public. There is little likelihood that the public will attribute to the owners of the property any of the diverse views represented, and the owners can dispel any possible misconceptions by posting appropriate signs disavowing any connection with the views expressed. First Amendment values would hardly be served in the circumstances of this case by sacrificing the state-sanctioned opportunity for the dissemination of a variety of ideas to the sensibilities of the property owner.

#### ARGUMENT

##### STATE PROTECTION OF THE REASONABLE EXERCISE OF SPEECH AND PETITION RIGHTS ON THE PROPERTY OF PRIVATELY-OWNED SHOPPING CENTERS TO WHICH THE PUBLIC IS INVITED IS CONSISTENT WITH THE PROPERTY RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS AND THE FREE SPEECH RIGHTS UNDER THE FIRST AND FOURTEENTH AMENDMENTS OF THE SHOPPING CENTER OWNERS

##### *A. Lloyd Corp. v. Tanner Does Not Require Appellees' Rights Under the California Constitution to Yield to Appellants' Property Rights*

The "basic issue" in *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), was "whether respondents, in the exercise of asserted First Amendment rights," were entitled to "distribute handbills on Lloyd's private property [a retail shopping center] contrary to its wishes and contrary to a policy enforced against all handbilling" (407 U.S. at 567; emphasis in origi-

nal). This Court answered that question in the negative essentially because "the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on *state* action" and a property owner could not, for purposes of those constitutional provisions, be held to stand "in the shoes of the State" where he had merely invited the public "to use [his property] for designated purposes" and had not assumed all the functions of "a state-created municipality" (407 U.S. at 567, 569; emphasis in original). This is the meaning ascribed to *Lloyd* in *Hudgens v. NLRB*, 424 U.S. 507, 518-521 (1976). Thus, despite references in *Lloyd* to "the Fifth and Fourteenth Amendment rights of private property owners" (407 U.S. at 570), the Court did not there purport to decide the extent to which shopping center owners were constitutionally privileged to bar the use of their premises for peaceful expressive activities where statutory or state constitutional protection going beyond the First Amendment has been extended to such activities.

The action taken by the Court in *Hudgens* underlines this point. The activity at issue there was picketing in support of collective-bargaining demands by the warehouse employees of Butler Shoe Co., which had a retail store (but not a warehouse) on the premises of the shopping center owned by petitioner *Hudgens*. The picketing, which was not determined to be unlawful in its manner or purpose, was clearly speech activity protected against governmental prohibition under the First Amendment (see *Interna-*

*tional Brotherhood of Teamsters, Local 695 v. Vogt, Inc.*, 354 U.S. 284, 294-295 (1957)); and both the National Labor Relations Board, which had found an unfair labor practice on the basis of the shopping center manager's threats to have the picketers arrested (205 N.L.R.B. 628 (1973)), and the Fifth Circuit, which had enforced the Board's order (501 F.2d 161 (1974)), had at least implicated First Amendment rights in their decisions by reliance on this Court's decision in *Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), a First Amendment case. After determining that *Logan Valley*, which had recognized a First Amendment right protecting certain union picketing on the premises of a privately owned shopping center,<sup>2</sup> had been

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<sup>2</sup> The picketers in *Logan Valley* were union members protesting the opening of a supermarket employing nonunion employees who were "not 'receiving union wages or other union benefits.'" 391 U.S. at 311. The picketers had marched in an area in front of the supermarket in the middle of the shopping center grounds. The Court concluded that the lower courts, which had enjoined the picketing, had done so solely because it was a trespass under state law and not because it was directed at any illegal end; thus, had the picketing occurred on publicly owned property, such as parks or public sidewalks, it would have enjoyed the protection of the First Amendment. Relying on *Marsh v. Alabama*, 326 U.S. 501 (1946), in which the First Amendment had been extended to the distribution of religious literature on the streets of a privately owned "company town," the Court held that the picketing was protected because the roadways and sidewalks of the shopping center, which were open to the public, were "functional equivalents of the streets and sidewalks of a normal municipal business district" (391 U.S. at 319).

effectively overruled by *Lloyd*, and that, accordingly, "under the present state of the law the [federal] constitutional guarantee of free expression has no part to play in a case such as this" (*Hudgens, supra*, 424 U.S. at 521), the Court held that "the rights and liabilities of the parties in this case are dependent exclusively upon the National Labor Relations Act" (*ibid.*); and it remanded to the Board for a determination of the accommodation to be made between rights of the employees under Section 7 of the Act, 29 U.S.C. 157, and the private property rights of *Hudgens* (424 U.S. at 521-523).

In identifying the principles applicable to reaching that accommodation of rights, the *Hudgens* Court did not advert to *Lloyd* for a definition of the extent of a shopping center owner's constitutional right to exclude picketers or handbillers from his property. Rather, it noted the broad principle announced in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956), and reaffirmed in *Central Hardware Co. v. NLRB*, 407 U.S. 539, 544 (1972), that the accommodation between Section 7 rights and property rights must be made "with as little destruction of one as is consistent with the maintenance of the other" (*Hudgens, supra*, 424 U.S. at 522). Moreover, the Court observed that the "locus of that accommodation \* \* \* may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context" and that "[i]n each

generic situation, the primary responsibility for making this accommodation must rest with the Board in the first instance" (*ibid.*).<sup>3</sup>

Just as *Lloyd* provided no basis for defining the extent of a private shopping center owner's right to exclude persons claiming the protections of the National Labor Relations Act, so it provides no firm definition of such an owner's right to exclude persons claiming the protection of Sections 2 and 3 of Article I of the California Constitution, which state that "[e]very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. \* \* \*" (Section 2) and that "people have the right to \* \* \* petition government for redress of grievances" (Section 3). Unlike the First Amendment to the United States Constitution (but like Section 7 of the NLRA), these provi-

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<sup>3</sup> Homart Development Co., in its brief as amicus curiae in support of appellants (Homart Br. 12-13), contends that the California Supreme Court's construction of the state constitutional provisions at issue here "impermissibly regulates conduct encompassed by the national labor law" because it would apply to both union and non-union speech and petitioning. Homart asserts that this would compel "the Center to forego its federally protected right to exclude *union* speech and petitioning" in the case of non-employee union activities that would not be entitled to access to the Center's property under the NLRA.

That, however, is an issue not presented in this case. The present case involves only petitioning unrelated to any concerns of the NLRA, and this Court need not here decide whether or to what extent the NLRA may preempt application of the California Constitution to union speech and petitioning at privately owned shopping centers.



sions are affirmative statements of rights to be enjoyed, not simply statements cast in the negative prohibiting government from abridging rights of free expression.<sup>4</sup> The highest court of California has construed them as protecting the right, under appropriate time, place, and manner rules, to circulate petitions and distribute handbills at shopping centers "even when the centers are privately owned" (J.S. App. C-12). That construction of these state constitutional provisions is, of course, binding on this Court, even though the question whether appellants enjoy paramount federal rights is for this Court to determine. Thus, even accepting appellants' view (Br. 9-10) that an essential part of the *Lloyd* holding was a balance struck between First Amendment free speech rights and a shopping center owner's property rights under the Takings Clause of the Fifth Amendment, incorporated in the Due Process Clause of the Fourteenth Amendment, it cannot be concluded that the balance must be struck in favor of the shopping center owner here simply because that was the result in *Lloyd*. In *Lloyd* the Court stated that "[i]t would be an unwarranted infringement of property rights to require them to yield to the exercise of *First Amendment rights* under circumstances where adequate alternative avenues of communication exist" (407 U.S. at 567; emphasis added), and it concluded that avail-

<sup>4</sup> Section 2, Article I of the California Constitution also includes a provision similar to the First Amendment: "A law may not restrain or abridge liberty of speech or press."

able public areas such as sidewalks, streets, and parks are adequate alternatives where messages unrelated "to any purpose for which the center was built and being used" are concerned (*id.* at 564, 566-567). But that determination does not answer the question whether affirmative free-expression rights conferred by the California Constitution can be vindicated where public parks, streets and the like are open to the exercise of such rights but shopping centers in which great concentrations of the population are to be found during the course of a day are closed for that purpose.<sup>5</sup>

<sup>5</sup> As appellants note (Br. 18-19), the "adequate alternatives" formula of *Lloyd* appears to be an adaptation of the *Babcock & Wilcox* test for accommodating the Section 7 rights of employees vindicated through nonemployee union organizers with the property rights of an employer (*NLRB v. Babcock & Wilcox Co.*, *supra*, 351 U.S. at 112-113). This Court has not, however, locked in even the Board to applying that test in precisely the way it was applied in *Babcock & Wilcox*. (It would be reasonable, for example, to require stronger proof that nonemployee union organizers have no adequate alternatives for conveying their message to employees in a case involving fenced-off industrial property, such as that concerned in *Babcock & Wilcox*, than in a case involving property open to the public; the employer's interest in keeping nonemployees off his property is more attenuated in the latter case.) Non-employee status of picketers or organizers is simply a factor to be considered in determining the "locus of [the] accommodation" between conflicting rights (*Hudgens v. NLRB*, *supra*, 424 U.S. at 522). This Court has never held that "the Board [is] confined to its earliest experience in administering the [*Babcock & Wilcox*] test." *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 211 (1978) (Blackmun, J., concurring).

It follows that, contrary to appellants' contention (Br. 10-12), the decision in *Lloyd* does not compel the conclusion that construing Article I, Sections 2 and 3 of the California Constitution to grant appellees the right to engage in the peaceful and orderly solicitation of petition signatures in a corner of the central courtyard of the Center effects a taking of property for which just compensation must be given under the Fifth and Fourteenth Amendments of the United States Constitution. The conclusion of the California Supreme Court that this restriction on appellants' right to exclude persons from its property is not a taking requiring compensation is, moreover, supported by this Court's decisions construing the Fifth and Fourteenth Amendments as they apply to property right claims.

**B. Under Principles Developed in This Court's Decisions Construing the Takings Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment, the Limited Restriction Imposed by the California Constitution on Appellants' Freedom to Exclude Persons From the Shopping Center Premises Is Not a Taking of Their Property**

In *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), this Court had occasion to summarize principles developed in its decisions construing the Takings Clause and the correlative guarantee against deprivation of property without due process in the Fourteenth Amendment. Noting that those decisions amounted to "essentially ad hoc, factual inquiries" to determine in each case whether "justice and fairness" require[d] that economic in-

juries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons" (438 U.S. at 124), the Court nonetheless discerned "several factors that have particular significance" (*ibid.*). See also *Andrus v. Allard*, No. 78-740 (Nov. 27, 1979), slip op. 14. The factors identified by the Court were (1) "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations" (438 U.S. at 124); (2) whether there is an "interference with property [that] can be characterized as a physical invasion by government" (*ibid.*); (3) whether the government actions in question "may be characterized as acquisitions of resources to permit or facilitate uniquely public functions" (*id.* at 128); and (4), in the case of use restrictions on real property, whether the restrictions are "reasonably necessary to the effectuation of a substantial public purpose" (*id.* at 127).<sup>6</sup>

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<sup>6</sup> In some cases, it is readily apparent whether there has been a taking of property, and the Court need not engage in a complex weighing of factors. Thus, in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), the Court quickly and firmly rejected the contention that because Title II of the Civil Rights Act of 1964, 42 U.S.C. 2000a *et seq.*, made it unlawful for owners of motels and other public accommodations to select customers on the basis of race, the Act constituted a taking of property without just compensation. 379 U.S. at 261. Appellants in the present case do not claim any right to exclude members of the public on the basis of race,



The first factor clearly weighs against the finding of a taking in the present case. Appellants do not describe any specific way in which they will be economically harmed by the presence on their property of persons, such as appellees, who solicit signatures on petitions in an orderly manner. One may speculate that the Center's maintenance and security costs might be slightly increased or that a slight decrease in sales might result because some shoppers, hostile to views expressed by those distributing literature or soliciting petition signatures, might leave the Center without buying anything (see brief filed by Homart Development Co. as amicus curiae in support of

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yet their unqualified statement (Br. 11-12) in reliance on *Kaiser Aetna v. United States*, No. 78-738 (Dec. 4, 1979), slip op. 15, that "the 'right to exclude' is such a central element of private property that the government, even in the name of reasonable regulation, cannot diminish that right without paying compensation" might well encompass such a right. *Kaiser Aetna* neither questioned the holding with respect to the taking claim in *Heart of Atlanta Motel* nor otherwise suggested any change in the settled law with respect to antidiscrimination statutes. See, e.g., *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972). As to the labor laws, appellants concede, as they must (Br. 18-19), that employers enjoy no absolute right to exclude from their property persons, such as nonemployee union organizers, whose presence there is essential to the employees' exercise of their Section 7 rights under the NLRA. The reference to a "right to exclude" in *Kaiser Aetna* should, in sum, be read in the context of that case, where the property owners' ability to charge a fee was indispensable to securing a reasonable return on their investment (see pages 22-23, note 8, *infra*).

appellants at 10-11). But, to the extent any such impact may exist (and is not offset by the protected activities' attraction of patrons to the shopping center), it is a far less substantial impact than that present in many cases in which takings claims have been rejected. See, e.g., *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958) (company forced to close down gold mines); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (75% diminution in land value caused by zoning laws).

Certainly appellants have shown no substantial interference with "distinct, investment-backed expectations" (*Penn Central Transportation Co. v. New York City*, *supra*, 438 U.S. at 124) or with the opportunity for a reasonable return on their investment. The use of private property in our society has always been subject to restrictions imposed in the public interest, and the trend has been away from, not towards, an absolute right to treat one's property as one chooses without regard to the impact on public welfare. Powell, *The Relationship Between Property Rights and Civil Rights*, 15 Hastings L.J. 135, 140-150 (1963). Some common examples are rent control laws; zoning restrictions prohibiting owners from constructing more than a certain number of buildings on their property or from constructing buildings above a certain height or closer than a given distance to the public streets; nuisance laws restricting or prohibiting entirely the operation of particular kinds of businesses; historic preservation laws restricting



the changes that may be made to buildings of historic importance; and laws requiring the developers of large residential subdivisions to dedicate parts of their property to public use.

The "liberty of speech" provision now embodied in Article I, Section 2 of the California Constitution has existed in that constitution since 1849 (see Note, *Rediscovering the California Declaration of Rights*, 26 Hastings L.J. 481, 495 (1974)); and for that length of time it has qualified the property rights of those whose use of their property would infringe on its guarantee. Appellants and owners of other large shopping centers have, according to the findings of the California Supreme Court, used large tracts of property in such a way as to divert large potential audiences from the public areas where, under this Court's decisions, First Amendment rights may be exercised, to private shopping areas, walkways, and courtyards (J.S. App. C-7 to C-9, C-11 to C-13). A determination, such as that made by the California Supreme Court, that this use of property entails obligations under the affirmative free speech guarantee of the California Constitution is not unreasonable or unforeseeable. "[I]f one embarks in a business which public interest demands shall be regulated, he must know regulation will ensue." *Nebbia v. New York*, 291 U.S. 502, 534 (1934). See 86 Harv. L. Rev. 1592, 1606 (1973).

Moreover, it is not without significance that this restriction on appellants' right to exclude persons

from their property is imposed by state law. As this Court has recently observed, "[T]he great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state." *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378 (1977), quoting *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 155 (1944). See also *Kaiser Aetna v. United States*, No. 78-738 (Dec. 4, 1979), slip op. 15. State law conferring rights in property and defining the limitations of those rights is, accordingly, ordinarily the source of those rights, rather than a taking of them—especially where, as here, the pertinent state constitutional provision long antedates any claim or investment by the appellants.

The question whether there is a "physical invasion by government" is another factor that, despite appellants' suggestion to the contrary (Br. 11 n.4), is not significantly in their favor. In nearly all the cases in which this factor has played a significant part it is the government in its entrepreneurial role that has invaded the property. See, e.g., *Griggs v. Allegheny County*, 369 U.S. 84, 89 (1962) (invasion of air easements by low-flying planes that leased landing and takeoff rights from airport owned and promoted by the county); *United States v. Causby*, 328 U.S. 256 (1946) (physical invasion of land by low overflights of military aircraft); *Portsmouth*

*Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922) (gunfire from military installations across private lands). This additional factor that government, as an enterprise, was benefiting directly from the invasion of the claimant's property reinforced the significance of the invasion in each case. See Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 62-63 (1964).<sup>7</sup>

Even more significantly, it is difficult to characterize the use of appellants' property by leafleters or petitioners as an "invasion" at all, in view of the fact that appellants have issued a general invitation to the public to enter the premises, and that the invitation is not conditioned, as was the case in *Kaiser Aetna v. United States*, *supra*, on the payment of an admission or user charge.<sup>8</sup> It is true that appellants

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<sup>7</sup> Professor Sax has since revised his theory distinguishing between actions by which the government as an enterprise competes for resources (giving rise to a claim for compensation) and actions by which government mediates between private claimants to use of resources (seen as not compensable); but the change in his theory has resulted in the conclusion that "[m]uch of what was formerly deemed a taking is better seen as an exercise of the police power in vindication of \* \* \* 'public rights.'" Sax, *Takings, Private Property and Public Rights*, 81 Yale L.J. 149, 151 (1971).

<sup>8</sup> In *Kaiser Aetna*, petitioners, at considerable expense, had developed a private pond into an exclusive marina, the use of which was offered to boatowners for a fee. The Court held that the mere fact that dredging and filling operations by petitioners had linked the pond to the ocean and thereby connected it to a navigable water of the United States was not a sufficient basis for requiring public access without charge. The government had not suggested in consenting to petition-

do not wish persons to engage in handbilling or the like on their property, but it is the activity—not the presence of additional people—they object to; and the California Supreme Court has made it clear that shopping centers are free to restrict that activity by time, place, and manner rules that will minimize any interference with the commercial functions of the property (J.S. App. C-12).<sup>9</sup>

Finally, there is the factor whether the statutory or constitutional provision in question is "reasonably necessary to the effectuation of a substantial public purpose" (*Penn Central Transportation Co. v. New York City*, *supra*, 438 U.S. at 127). This is fundamentally a question whether that provision represents a reasonable exercise of the police power. *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962). See also *Nebbia v. New York*, *supra*, 291 U.S. at 525. The cases "leave no doubt" that those contending that a taking has occurred have "the burden on 'reasonableness.'" *E.g.*, *Bibb v. Navajo Freight Lines*, 359

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ers' dredging and filling that such a public-access condition would be imposed, and the Court noted that such conduct by officials "can lead to the fruition of a number of expectancies" (slip op. 15). In short, *Kaiser Aetna* was a case of interference with "distinct investment-backed expectations."

<sup>9</sup> In addition, as one commentator has observed, the rule favoring compensation in cases involving physical invasion is sometimes justified on the ground that "physical appropriation" may be a ready basis for calculating damages; yet damages are not at all easy to calculate when the asserted injury to property rights is conduct engaged in on property open to the general public at no charge. 86 Harv. L. Rev. 1592, 1604 n. 55 (1973).



U.S. 520, 529 (1959) (exercise of the police power is presumed to be constitutionally valid); *Salzburg v. Maryland*, 346 U.S. 545, 553 (1954) (the presumption of reasonableness is with the State); *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938) (exercise of police power will be upheld if any state of facts either known or which could be reasonably assumed affords support for it).” *Goldblatt v. Hempstead*, *supra*, 369 U.S. at 596. In the present case the California Supreme Court has found that a substantial public purpose embodied in the California Constitution—assuring free expression of ideas and the right to petition—cannot be effectuated without permitting orderly exercise of those rights on the grounds of shopping centers; for it is there, rather than in traditional downtown business districts, where the largest segments of the population congregate to shop, attend theaters, and take advantage of banking and other services. Construing the California Constitution to protect the rights of appellees in this case to solicit signatures on their petitions in the courtyard of the Center is, therefore, not a shift in principle but merely a reasonable response to changed conditions. As this Court observed with respect to zoning regulations in *Euclid v. Ambler Realty Co.*, *supra*, 272 U.S. at 387:

Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbi-

trary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise. \* \* \*.

**C. The Right of Access to Shopping Center Property for the Exercise of Speech and Petition Rights Under the California Constitution Does Not Infringe the Property Owner's Rights Under the First and Fourteenth Amendments**

Appellants (Br. 12-14, 21) and amici (Taubman Co. Br. 17-18;<sup>10</sup> Homart Br. 11-12), relying principally on this Court's decision in *Wooley v. Maynard*, 430 U.S. 705 (1977), assert that the decision of the court below violates the First Amendment rights of appellant Sahadi because it robs him of his “rights to remain silent” (App. Br. 13) and requires him to “sponsor positions that are not [his]” (Taubman Co. Br. 17), or at least to “‘participate in the dissemination of an ideological message by displaying it on his private property’” (Homart Br. 12, quoting *Wooley v. Maynard*, *supra*, 430 U.S. at 713). These

<sup>10</sup> Brief amicus curiae filed by the Taubman Co., Inc., and California Business Properties Ass'n in support of appellants.



contentions rest on an inapt analogy between the circumstances of an individual compelled to display a motto, prescribed by the government, on an automobile that he drives "as part of his daily life" (430 U.S. at 715) and those of the owner of business property, open to the public, who is required to grant limited access to his property to other persons so that they may communicate their views to the public. In the present case there is no particular "ideological message" dictated by the State (*ibid.*), and each one of the variety of messages disseminated by different persons exercising their rights under the California Constitution is immediately identifiable with its source—the person who expresses it orally or in writings that he personally distributes. Such a message is, at most, only remotely linked to the owner of the property on which that person stands.<sup>11</sup> And

<sup>11</sup> *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), upon which appellants also rely, is even less apposite in this respect, since it involved a compelled recitation of a message containing an affirmation of belief. The connection between the compelled message and the one complaining of a First Amendment violation was also closer in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), than it is here. The statute at issue there—a law requiring newspapers to publish replies by politicians whom the newspapers attacked in print if the politicians demanded a right to reply—was, moreover, treated fundamentally as an abridgment of First Amendment guarantees of a free press. The Court observed that the law interfered with editorial judgment of what to publish or not publish (418 U.S. at 256) and that it might induce newspapers to avoid the trouble and expense of complying with the law by avoiding controversial coverage of political candidates (*id.* at 257). No such considerations are present here.

even that tenuous link between the property owner and the message can be overcome by the simple expedient of posting signs in the area where the speakers or handbillers stand, disavowing any sponsorship of the messages and explaining that the persons communicating the messages are there by virtue of state law.<sup>12</sup> As a realistic matter, therefore, the owner's involuntary "participation" in the dissemination of any message is de minimis or non-existent. It would hardly further First Amendment values to require in such circumstances that a uniquely available state-sanctioned opportunity for the dissemination of a variety of ideas be sacrificed to the property owner's sensibilities.

### CONCLUSION

The judgment of the Supreme Court of the State of California should be affirmed.

WADE H. MCCREE, JR.  
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<sup>12</sup> Because shopping center owners are free to establish time, place, and manner rules, they may designate the particular places where the rights concerned here could be exercised.

No. 79-289

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IN THE  
**Supreme Court of the United States**  
October Term, 1979

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PRUNE YARD SHOPPING CENTER, *et al.*,

*Appellants,*

v.

MICHAEL ROBINS, *et al.*,

*Appellees.*

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On Appeal from the Supreme Court  
of the State of California

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**BRIEF AMICUS CURIAE OF THE AMERICAN  
FEDERATION OF LABOR AND CONGRESS  
OF INDUSTRIAL ORGANIZATIONS**

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IN THE  
**Supreme Court of the United States**

October Term, 1979

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**No. 79-289**

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PRUNE YARD SHOPPING CENTER, *et al.*,  
*Appellants,*  
v.  
MICHAEL ROBINS, *et al.*,  
*Appellees.*

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On Appeal from the Supreme Court  
of the State of California

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**BRIEF AMICUS CURIAE OF THE AMERICAN  
FEDERATION OF LABOR AND CONGRESS  
OF INDUSTRIAL ORGANIZATIONS**

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This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations, a federation of national and international labor organizations having a total membership of approximately 13,500,000 working men and women, with the consent of the parties as provided for in Rule 42 of this Court.

**INTRODUCTION AND SUMMARY OF ARGUMENT**

The constitutional claim pressed by appellants and the *amici curiae* appearing on their behalf is notably imprecise in several respects.

*First*, the nature of the right of free expression in shopping centers provided by the California Constitution is



never brought into focus. Upon close viewing, the so-called "right of access"<sup>1</sup> or, more extremely, the supposed right to "appropriation of private property"<sup>2</sup> or "to commandeer . . . private property"<sup>3</sup> turns out to be a regulation of the use of private property far less intrusive than this rhetoric seeks to suggest. For, appellees did not seek a court injunction to permit them to gain access to the Prune Yard. They had no need to do so, since it was not appellees' presence on its property which the Prune Yard sought to curtail, but their expressive activities while present. (Of. *Hudgens v. NLRB*, 424 U.S. 507, 521-522 n. 10; *Eastex, Inc. v. NLRB*, 437 U.S. 556, 572-573; compare *Agriculture Labor Relations Bd. v. Superior Court*, 16 Cal. 3d 392, appeal dismissed for want of a substantial federal question, 429 U.S. 802.)

Further, the California Supreme Court expressly declared that Article I, Section 2 of the California Constitution protects speech in private shopping centers only if "reasonably exercised," specifying that appellants may adopt "reasonable regulations to assure that these activities do not interfere with normal business operations." (23 Cal. 3d at 911, emphasis supplied). Except in the trivial sense that "any visitor to a [shopping center] necessarily occupies a certain area of ground or floor space wherever he stands . . ." (*In re Wallace*, 3 Cal. 3d 289, 295; see *Diamond v. Bland*, 3 Cal. 3d 653, 665 n. 3), no "obstruction" of the Prune Yard's walkways has been sanctioned. The Prune Yard's patrons remain free, without coercion or physical interference, to enter the stores and use the Center's other facilities, and the

<sup>1</sup> Brief of Appellants ("App. Br.") at 9.

<sup>2</sup> Brief of Homart Development Co. as Amicus Curiae ("Homart Br.") at 7.

<sup>3</sup> Brief Amicus Curiae of the Taubman Co., Inc., et al., at 9.

Prune Yard remains free economically to exploit its property as a retail commercial facility.<sup>4</sup>

The California Constitution, consequently, recognizes a right of expression upon private shopping center property only because, and only to the extent that, such expression is compatible with the basic use to which that property has been devoted by its owner.<sup>5</sup> It does not attempt to limit that basic use, nor does it sanction expressive activity which impedes that use.

Second, appellants' concrete interest in avoiding the very limited regulation of the Prune Yard's operations imposed by the decision below is left vague. Appellants have not even alleged, much less proved, that appellees' activities would cause appellants any loss.<sup>6</sup> Nor do appellants, although seeking to discover in the First Amendment as well as the Fifth Amendment some basis for their contentions (App. Br. at 12), suggest that there has been

<sup>4</sup> Thus, to suggest that California's construction of the state's Constitution presents "safety problems involving crowd control" and "dangers of violence" (Homart Br., at 4) is sheer fabrication, without support in either the facts of this case or the legal rights recognized in the opinion below.

<sup>5</sup> Despite representations to the contrary, it is *not* "likely that the private forums established by the decision below would be extended to the smallest business and even to private residences." (Homart Br., at 4). Indeed, the California Supreme Court expressly abjured any such implication, emphasizing that the case does not involve "the property or privacy rights of an individual homeowner or the proprietor of a modest retail establishment." (23 Cal. 3d at 910.)

<sup>6</sup> While appellee Homart does attempt to fill this gap with imaginative suggestions of "substantial adverse impact on normal commercial activities" (Homart Br., at 7), the allegations of a projected loss of revenue are not only entirely without any support in the record but are in this context contrary to reason: Since all competing shopping centers in California will be subject to the

any interference with their right to speak; indeed, they advance no interest other than the commercial interest in running their business, and that interest is not protected by the First Amendment. Further, the use to which appellants have chosen to devote the Prune Yard precludes any claim of an interest in privacy, quiet or solitude for their own sake as might pertain in a private home. Thus, it appears that appellants assert only the abstract "interest of the shopping center's owner in controlling the use of his property." (App. Br., at 17.) To isolate that interest is not to denigrate it, but it is to make clear that appellants' arguments rest squarely upon a claimed federal constitutional right of absolute, arbitrary control over private property which does not exist. (*Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365.)

Third, appellants refuse to recognize the governmental interest underlying Article I, Section 2, of the California Constitution as applied in this case.<sup>6</sup> The California Supreme Court, however, was quite clear in identifying that interest, and in stressing its importance to the state:

[C]entral business districts . . . have continued to yield their functions more and more to suburban centers. Evidence submitted by appellants in this case helps dramatize the potential impact. Shopping centers . . .

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same requirement of tolerating peaceful expressive activity, and since retail centers fronting on public sidewalks can not prevent such activity, there is likely to be no relative loss or gain of business due to the requirement. (See *Atlanta Motel v. United States*, 379 U.S. 241, 260.)

<sup>7</sup> "This is a case involving, on the one hand, the interest of appellees in utilizing the property of the shopping center owners to convert others to their cause and, on the other hand, the interest of the shopping center's owner in controlling the use of his property." (App. Br. at 17).

provide essential and invaluable forum . . . [23 Cal. 3d at 907, 910] <sup>8</sup>

Thus, the premise of the decision below is that the growth of shopping centers and consequent decline of traditional business districts threaten to eliminate the "assembly, communicating thoughts between citizens, and discussing public questions [which has taken place on] streets and public places . . . from ancient times" (*Hague v. CIO*, 307 U.S. 496, 515), and that there is a governmental as well as private interest in preventing the erosion of that opportunity to communicate.<sup>9</sup>

Fourth, finally, and perhaps most important, the precise parameters of appellants' alleged federal constitutional right to resist state regulation of expressive activity on

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<sup>8</sup> The evidence showed that, in the San Jose vicinity, the downtown area has been entirely supplanted as a commercial center and gathering area by suburban shopping centers, to the degree that by 1973 retail sales in the central business district were negligible. (23 Cal. 3d at 907).

<sup>9</sup> The connection between shopping center growth and traditional business district decline shown by the expert testimony in this case has been demonstrated as well by careful studies conducted in other areas. One review of such studies concluded that "[t]he opening of regional shopping malls in the smaller urban areas . . . reduced the level of sales in central business districts . . . [and diverted] shoppers to new malls while [in larger urban areas] . . . Central Business District sales activity declined during the same period that large regional malls opened." (J. Miller & C. Soble, *Shopping Malls and CBD Activity—A Survey of Studies and Their Urban Policy Implications* (The Urban Institute, June, 1979) (at 2). Concomitant effects have been decline in tax revenues of central cities as well as substantial decreases in property values. (*Id.*, at 36-37.) As a result of such impact, several states now are attempting to assess the likely effect of proposed shopping centers upon central cities before issuing required approvals or aiding development by providing transportation, sewage, or other public facilities. (*Id.*, at 40-43.)

shopping center property are conveniently left cryptic. Thus, despite reliance upon cases construing the takings clause of the Fifth Amendment (App. Br., at 11-12), appellants do not squarely rely upon that clause as the basis for the constitutional invalidity they claim. Rather, recognizing that "this is not a condemnation case" (*id.* at 11 n. 4), they merely observe that the takings cases are "relevant" in the present context, and that the right to control speech on private property is "rooted in" the takings clause. Similarly, appellants look to the First Amendment not for its own force but, instead, as one of the "origins" of the "constitutional rights of private property owners." (Juris. Stat., 12.)

This imprecision about the source and character of the constitutional rights infringed is not surprising. For, as we discuss in Part I of this brief, the Constitution, far from establishing a principle of absolute private control over property, recognizes that the specific rights which inhere in the ownership of property vary from place to place, and from time to time. The states, not the federal government, generally create and define property rights. Consequently, in a case claiming a violation by a state of constitutionally protected property rights, the first issue is whether the state has merely acted to define the property right in question and not to contract a right already established. If so, there is an independent state ground for the decision and no jurisdiction in this Court. The evolution of the California law indicates that this may well be the situation here.

Even in cases in which there has been a discernible and detrimental change in state law concerning control over private property, or in which the federal government acts to alter property rights as defined by the state, there are only

two narrow constitutional barriers. The first, the takings clause, is inapplicable in this instance because the economic effect of the protection of speech here at issue is either minimal or non-existent; because only a minute portion of the property rights of a shopping center owner have been affected; and because no investment expectations have been defeated. The second, the substantive aspect of the due process clause, has long been construed to protect property interests only to the extent of assuring a rational connection between the governmental regulation and the legitimate interest pursued. Appellant's representation to the contrary notwithstanding the interest of California in maintaining a viable public dialogue is one at least as legitimate and therefore at least as entitled to broad deference, as those involved in the decided cases involving substantive due process challenges to economic regulations. And surely the means of reaching that goal—limiting the right of shopping center owners to oust those engaged in expressive activity—is a logical one.

There remains appellant's attempt to escape the relevant property cases by discovering some "fundamental" right which has been abridged. Appellants posit that the "right to exclude" is such a right. While the "right to exclude" theory is premised largely upon a recent case, *Kaiser Aetna v. United States*, 48 L.W. 4045, the opinion there did not even remotely declare that private property is immune from governmental control. Rather in *Kaiser Aetna* it was critical the "right to exclude" was precisely the aspect of property ownership that the company was economically exploiting. Indeed, the so-called "right to exclude," while traditionally a valued aspect of property ownership, has like all the other "rights" which inhere in such ownership,



been limited and regulated over the years to meet emerging social needs. Perhaps the most important examples are the public accommodations regulations such as Title II of the Civil Rights Act of 1964. *Atlanta Motel v. United States*, 379 U.S. 241 reviewed the relevant history and expressly upheld Title II's limit on the "right to exclude." Since the regulation here is indistinguishable in principle, this aspect of this case is controlled by *Atlanta Motel*. (See also *Andrus v. Allard*, 48 L.W. 4013 (right to alienate property subject to severe diminution).) A second attempt to reach a more exacting constitutional review standard is presented by appellants' somewhat paradoxical claim that the First Amendment bars the States from granting the public a right to engage in expressive activity within shopping centers. This argument is in fact nothing more than a semantic subterfuge. For, upon analysis it becomes clear that the right asserted is simply the same right of absolute property control discussed above and not an interest involving any First Amendment values at all.

In part II of our argument we show that appellants' heavy reliance on *Lloyd Corp. v. Tanner*, 407 U.S. 556, is entirely misplaced. That case said and decided nothing concerning the power of the federal or state governments to require the owner of a shopping center to permit members of the public to engage in expressive activity thereon. What *Lloyd* did decide was that a privately owned shopping center, like that of the present appellants, was not so dedicated to public use as to entitle members of the public to claim a right derived directly from the First Amendment to distribute handbills, to picket, or to circulate petitions. This reading is confirmed by the Court's lengthy quotation of *Lloyd's* "ultimate holding" in *Hudgens v. NLRB*, 424 U.S. at 518-520. In the present case, by contrast, the ap-

pellees' right to circulate petitions on appellants' property is based not on the First Amendment "state action" theory rejected in *Lloyd* and *Hudgens*, but on Article I, Section 2, of the California Constitution, which has been authoritatively construed to grant them that right. In this respect, the case therefore parallels *Hudgens* and *Central Hardware Co. v. NLRB*, 407 U.S. 539 (which was decided together with *Lloyd*): In each of those cases the union seeking to engage in expressive activity on privately owned property asserted a right to do so under the National Labor Relations Act. Having held that the unions could not rely on the First Amendment, the Court remanded for further consideration by lower tribunals the question whether the NLRA grants that right.

The distinction between a claim based on the Constitution, on the theory that the owner of property is subject to constitutional restraints because he has assumed some of the power or functions of government, and a claim based on some state or federal law which regulates the respective rights and duties of members of the public owners of property, is recognized in this Court's decisions. (Compare, e.g., *Moose Lodge v. Irvis*, 407 U.S. 163, with *Runyon v. McCrary*, 427 U.S. 160.) It was articulated with special force by Mr. Justice Black in his separate opinions in *Bell v. Maryland*, 378 U.S. 226, 318, and *Atlanta Motel v. United States*, 379 U.S. at 261-278: Justice Black's views in this connection merit particular attention because his dissenting opinion in *Bell* anticipated his dissenting opinion in *Food Employees v. Logan Plaza*, 391 U.S. 308, 327, which was approved by the Court *Lloyd* and *Hudgens*.

## ARGUMENT

### I

#### **The Fifth and First Amendments Do Not Limit the States' Authority to Regulate Land Use in Order to Permit the Discussion of Public Issues in Areas Open to the Public.**

(A.) California has determined that modern-day land use patterns—principally, the increasing suburbanization of which shopping centers are both a cause and an effect—require shopping centers to permit expressive activity if the public dialogue is to be maintained.<sup>10</sup> This felt need to respond to a novel form of land use and the problems that use creates is similar to the dynamic which led, when the trend was not suburbanization but urbanization, to comprehensive zoning ordinances:

Building zone laws are of modern origin. They began in this country about 25 years ago. Until recent years, urban life was comparatively simple; but, with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, addi-

<sup>10</sup> This condition upon the use of land as a shopping center is a very minor aspect of government involvement in the establishment and operation of shopping centers in California. A chapter on shopping centers in 13 W. Bell & C. Seneker, *California Real Estate Law & Practice* (1978) advises potential developers as follows:

Local zoning regulations should be investigated to determine if the area is zoned for commercial development. . . . In order to have an area suitably rezoned or to obtain building permits, a developer should examine the local regulations and any underlying plans or policies, such as a general plan which may affect the construction of a shopping center in that particular location.

The necessity for and cost of compliance with other land use regulations such as California Environmental Quality Act [Pub. Res. Code § 21000-21179], the California Coastal Zone Conservation Act [Pub. Res. Code §§ 27000-27650], the federal Clean Air Act [42 U.S.C. §§ 1857-1858(a)] or the California

tional restrictions in respect of the use and occupation of private lands in urban communities. [*Village of Euclid v. Amber Realty Co.*, 272 U.S. 365, 386-387.]

And, indeed, the dynamic is similar to that underlying the evolution of the law of property generally:

“Even as regards things recognized for seven centuries as property, the rights in them recognized by law have been forever changing. . . . Instances of new rights thus recognized, and of old rights that have decayed or totally disappeared, might be given in great numbers. . . . In short, the concept of property never has been, is not, and never can be of definite content. . . . Changing culture causes the law to speak with new imperatives, invigorates some concepts, devitalizes and brings to obsolescence others.” [Philbrick, *Changing Conceptions of Property In Law*, 86 Univ. of Pa. L. Rev. 691, 692, 696 (1938).]

Further in this country, the task of defining those interests which comprise the “‘bundle’ of property rights” (*Andrus v. Allard*, 48 L.W. 4013, 4017) is ordinarily not a question of federal constitutional law but one of state law:

[A] . . . property interest is not a monolithic, abstract concept hovering in the legal stratosphere. It is a bundle of rights in personality, the metes and bounds

Water Quality Control Act [Wat. Code §§ 13000-13998] must also be considered. The effect of such regulation may make the project practically impossible or may increase its cost or the time necessary to obtain the all-necessary approvals.

If two or more buildings are to be constructed on the parcel for the purposes of later sale, leasing, or financing, compliance with the Subdivision Map Act [Gov. Code §§ 66410-66499.3] may be necessary. If five or more buildings are to be constructed for purposes of sale or lease, compliance with the Subdivided Lands Act [Bus. & Prof. Code § 11000-11030] may be necessary although the requirement for a public report can be waived by the Real Estate Commission [*Id.*, § 474.03.]

of which are determined by the decisional and statutory law of the [state]. The validity of the property interest in these possessions which respondents previously acquired from some other private person depends on [state] law, and the manner in which that same property interest in these same possessions may be lost or transferred to still another private person likewise depends on [state] law. [*Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 160 n. 10.]

Therefore "[w]hile the meaning of 'property' as used in the Fifth Amendment [is] a federal question, 'it will normally obtain its content by reference to local law.' " (*United States v. Causby*, 328 U.S. 256, 260, quoting *United States ex rel TVA v. Powelson*, 319 U.S. 266, 279. See also *Board of Regents v. Roth*, 408 U.S. 564, 577; *Bishop v. Wood*, 426 U.S. 341, 343 n. 7.) The incidents of private property ownership, then, traditionally vary both temporally and geographically:

[P]roperty has not the same meaning in this country with respect to any particular thing as one passes from state to state. If one owns land in different states, one's enjoyment therefore is restricted by varying policies of public control under the state police power; under municipal ordinances respecting public nuisances. . . . under state statutes respecting rural drainage . . . ; and so on. The non-statutory law respecting nuisance similarly varies. [Philbrick, *supra*, at 693.]<sup>11</sup>

(B.) This diversity means that in takings clause cases challenging state, rather than federal, action there is often a threshold question whether established property rights

<sup>11</sup> Other examples of incidents of real property ownership which vary from state to state and from time to time include: the rights of secured and unsecured creditors; the rules governing intestate transfers and transfer by devise; marital property principles; rules governing adverse possession; landlord-tenant laws; and the availability of trespass actions.

have been diminished at all, or whether the parties alleging a taking "have" never possessed under [state] law such a property right as they claim has been taken from them. If this is the case, appellants have no question for [this Court]." (*Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 42.) See also *Sauer v. New York*, 206 U.S. 536, 548:

This court has neither the right nor the duty to reconcile . . . conflicting decisions nor to reduce the law of the various states to a uniform rule which it shall announce and impose. Upon the ground, then, that under the law of New York, as determined by its highest court, the plaintiff never owned the easements which he claimed, and that therefore there was no property taken, we hold that no violation of the 14th Amendment is shown.

As the postponement of jurisdiction suggests this threshold issue appears to be implicated by this case. For, while on private shopping center walkways under Article I, Section 2 of the California Constitution, that opinion did not overrule any existing precedent in this regard and, indeed followed earlier California cases suggesting such a right. (See p. 16, n. 13, *infra*.) The majority in *Diamond v. Bland*, 11 Cal. 3d 331 (*Diamond II*), never reach the state constitutional question decided here, but rather, based upon its reading of *Lloyd Corp. v. Tanner*, 407 U.S. 551, decided to "expressly leave open that question." (11 Cal. 3d at 335 n. 4). And California's free speech provision, which is worded quite differently from the First Amendment, has long been regarded as "[a] protective provision more definitive and inclusive than the First Amendment. . . . *Dailey v. Superior Court*, (1896), 112 Cal. 94." (*Wilson v. Superior Court*, 13 Cal. 3d 652, 658.) In particular, Article I, Section 2 varies



from the First Amendment in that state action is *not* an express limitation upon the reach of the protection.

Thus, neither the language of the California Constitution nor its previous construction gave appellants and others in their situation reason to believe that they had a right under California law to oust from shopping centers individuals seeking to engage in speech-related activity. Consequently, "the nonfederal ground of decision has fair support [and] this Court [should] not inquire whether the rule applied by the state court is right or wrong or substitute its own view of what should be deemed the better rule for that of the state court." (*Demorest, supra*, 321 U.S. at 42.)

(C.) Even where state law does change, the federal Constitution, far from attempting to foreclose such experimentation and evolution from state to state imposes only two narrow limitations. The first, the takings clause of the Fifth Amendment, applicable to the states through the due process clause of the Fourteenth Amendment (*Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 266), "is designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" (*Armstrong v. United States*, 364 U.S. 40, 49). While this Court has not set out an "abstract or fixed point at which judicial intervention under the takings clause becomes appropriate," (*Andrus v. Allard, supra*, 48 L.W. at 3017), the takings clause is generally satisfied by a land-use regulation which is "substantially related to the promotion of the general welfare . . . and permit[s] reasonable beneficial use of the . . . site." (*Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 138.) In the present case both the "exercise of judgment [and] . . . the application of logic" (*Andrus v. Allard, supra*, 48 L.W. at 3017) demonstrate plainly that the minimal regulation here is not the

sort of burden upon property owners with which the takings clause is concerned. Even those cases which deemphasize the degree of economic loss which must occur before a taking is found concede that *at the least* "the damage [must be] substantial" (*United States v. Cress*, 243 U.S. 316, 328; *United States v. Causby, supra*, 328 U.S. at 266). Here, *as* noted, there is no allegation of any compensable damage at all, nor is it likely that such could be proven.<sup>12</sup> Further, it would not matter if some slight monetary value could be assigned to the right to oust appellees and others seeking to engage in speech activity. For,

"Taking" jurisprudence does not divide a [single parcel] into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the *nature and extent* of the interference with rights in the parcel as a whole. [*Penn Central, supra*, 438 U.S. at 130-131, emphasis added; see also *Andrus, supra*, 48 L.W. at 4017.]

Appellants certainly have no "distinct investment-backed expectations" (*Penn Central, supra*, 438 U.S. at 127) in the asserted right to prohibit expressive activities. Even if one were to regard such a right to be central to the economic investment motive in the way that the right to mine coal was

<sup>12</sup> Consequential damage, as opposed to diminution in the sale value of the property, is not compensable under the takings clause. "[T]he Fifth Amendment concerns itself solely with the 'property,' i.e., with the owner's relation as such to the physical thing and not with other collateral intended which may be incident to his ownership." (*United States v. General Motors Corp.*, 323 U.S. 373, 378.) Under this rule, it would appear that losses in revenues of the shopping center due to the *message* conveyed by persons engaging in expressive activity ought not to be a basis for compensation.

central in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393—a highly dubious proposition to begin with—it would be difficult to credit any expectation of absolute control in this regard, given the nearly twenty years of litigation on the issue.<sup>13</sup>

The substantive protection accorded property rights under the due process clause itself has a somewhat different thrust: to protect against government by whim and caprice. As long as a land use regulation is not “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare” (*Euclid*, *supra*, 272 U.S. at 395), this requirement is considered to be met. Appellants do not suggest that requiring shopping centers to permit expressive activity that formerly took place in the public forums the centers have had a hand in destroying is not a rational solution to the problem addressed.<sup>14</sup> Obviously, a sensible way to solve the problem of

<sup>13</sup> It was not until *Hudgens v. NLRB*, 424 U.S. 507 (1976)—after the incident which led to this litigation, and therefore plainly long after appellant determined to use its land for a shopping center—that *Food Employees v. Logan Plaza*, 391 U.S. 308 (1968) (hereafter “*Logan Valley*”) which declared a federal First Amendment right to speech activity in shopping centers in certain instances was definitely overruled. And, in California, a principle parallel to that established in *Logan Valley* had been announced previously (*Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers Union*, 61 Cal. 2d 766 (1964) cert. denied 380 U.S. 906.) Since the Prune Yard—as well as, we would suspect, almost all of the major shopping centers in California—was built after 1964 but before 1976, appellants had no legitimate expectation when they determined a use for their land that they could absolutely bar all expressive activity on the center.

<sup>14</sup> Amicus Homart does complain that “[n]o attempt was made by the court below to determine the necessity for or reasonableness of the impairment of Pruneyard’s rights.” (Homart Br., at 9). This criticism is unmerited, in light of the careful attention given by the court below to documenting the need for new areas of public dia-

the disappearing public forum is to permit the speakers to follow their intended audience to its new location. While there is a suggestion (App. Br. at 17) that this case is not within the *Euclid* rule because the state’s objective is not legitimate, “[l]ater cases have emphasized that the general welfare is not to be narrowly understood: it embraces a broad range of government purposes.” (*Moore v. City of East Cleveland*, 431 U.S. 494, 498 n. 6.) And the Court

has recognized, in a number of settings, that states and cities may enact land use restrictions or controls to enhance the quality of life by preserving the character and desirability aesthetic features of a city; see *City of New Orleans v. Dukes*, 427 U.S. 297 (1976); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9-10 (1974); *Berman v. Parker*, 348 U.S. 26 (1954). *Welch v. Swasey*, 214 U.S. [91] at 108 (1909). [*Penn Central*, *supra*, 438 U.S. at 129.]

The state’s interest here is in some ways quite similar to that in *Penn Central*—that is, in both instances preservation of traditional urban attributes is at the core of the regulation. And surely, as a “spiritual” purpose (*Berman*, 348 U.S. at 32), the interest in free expression and meaningful exchange of ideas is central to our national values.<sup>15</sup>

logue and the capacity of shopping centers to serve that role. And it is, in any event, wrong-headed: it was appellants’ burden to demonstrate the requirement to be unreasonable in order to substantiate their constitutional attack.

<sup>15</sup> The Court said in *Berman*, 348 U.S. at 33:

We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled.

The precise issue in *Berman* was whether a conceded taking which



(D.) The restriction imposed by Article I, Section 2 of the California Constitution is, then, well within the broad boundaries within which the federal Constitution leaves the states free to determine the scope of private property rights. Appellants, however, seek to erect from the due process clause a new constitutional barrier to adaptation of state property laws to changing conditions. Seizing upon a phrase from this Court's recent decision in *Kaiser Aetna et al. v. United States*, 48 L.W. 4045, 4049 (1979)—“the right to exclude others”—appellants claim, seemingly, that while all the other incidents of property are subject to substantial diminution and regulation under the test of the *Penn Central* case, the “right to exclude others” is so “fundamental” a right of property that it cannot constitutionally be impaired.

*Kaiser Aetna*, *supra*, establishes no such principle, nor does it depart at all from the holding of the *Penn Central* case. Following *Penn Central*, *Kaiser Aetna* rests upon an “interference with reasonable investment backed expectations” (48 L.W. at 4048); and upon a determination of substantial “devaluation of petitioner's private property” (*id.* at 4049). Indeed, the public use the government wanted to make of the property was the very use for which the owner had invested large sums of money, and exclusion of the public from those premises was central to the owner's business expectations. Charging people for entry (*id.* at 4050) was the essence of the owner's property interest in *Kaiser Aetna*, just as taking coal was the essence of the property owner's interest in *Pennsylvania Coal v. Mahon*, *supra*, 260 U.S. 393.

was compensated was for a “public,” as opposed to a private purpose. Thus, as *Berman* shows, the “public interest” limitation is applicable under both the branches of constitutional property protection.

Thus, *Kaiser Aetna* decides at most that the “right to exclude others” has become a test of constitutionality when exclusion is the key to the profit-making capacity of the enterprise. In that instance, exclusion is a surrogate for the essence of the property claim, the ability to make reasonable economic gain. Were this not the case, to take but the most obvious example, New York would have been able to prevent Penn Central from building a multi-million dollar skyscraper above its terminal without compensation, but would have violated the Constitution if it had restricted Penn Central from excluding a single individual from the use of the “public” portions of its terminal building.

It is clear that *Kaiser Aetna* did not rule that “the right to exclude” is immune from state control or even subject to lesser restriction than *other* elements of the property right such as use or alienation. No issue of state power to define or limit property rights was presented in *Kaiser Aetna*. Indeed, the Court declared at the very outset of its opinion that “under Hawaii law Kuapa Pond was private property.” (48 L.W. at 4046). The issues were whether the United States enjoyed a superior property right by virtue of the “navigational servitude” and if not whether its assertion of that servitude to compel *Kaiser Aetna* to permit free public access to the pond was a “taking” of the property as defined by the state. By answering the first of these questions in the negative and the second in the affirmative, the Court did not purport to draw back from prior Fifth and Fourteenth Amendment cases which have recognized broad governmental authority to regulate and limit various property rights.

Moreover, “right to exclude” decisions cited in *Kaiser Aetna* did not involve, or discuss, the power of the federal government to regulate or limit that right, or when such



limitation or regulation amounts to a taking for which compensation must be paid.

The passage in *United States v. Lutz*, 285 F.2d 736, 740 (C.A. 5), which is referred to in *Kaiser Aetna* reads as follows:

Ownership of property comprises numerous different attributes. The owner has the right to use and control the property, to exclude others from the use of it, and to sue to regain possession from one who has taken it without permission or to obtain damages from one who has injured it.<sup>16</sup>

This Court has of course sustained, against challenge under the due process clause and against the charge that there was a taking, countless laws which have regulated or prohibited uses which the owner wishes to make of his property.<sup>17</sup>

In *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383, 1394 (Ct. Cl.), the court said:

Implicit in the concept of ownership of property is the right to exclude others. Generally speaking, a true owner of land exercises full dominion and control over it; a true owner possesses the right to expel intruders. In order for an Indian tribe to establish ownership of land by so-called Indian title, it must show that it used

<sup>16</sup> The issue in *Lutz* was whether the United States, as the owner of certain tomatoes was entitled to the insurance proceeds collected for their loss by fire.

<sup>17</sup> The point of this portion of the court's discussion was that "[w]hen property is sold the question occurs as to when these attributes of ownership pass to the purchaser. The sale does not obscure the individuality of the various attributes of ownership, and the contracting parties may provide that certain attributes pass separately and at a different time from the others." [295 F.2d at 741.]

and occupied the land to the exclusion of other Indian groups.<sup>18</sup>

There is no suggestion that "full dominion and control of property" is not subject to the regulatory authority of Congress and of the states.

Finally, Mr. Justice Brandeis' dissenting opinion in *International News Service v. Associated Press, Inc.*, 248 U.S. 215, 250, could not have been cited in support of the proposition that the right to exclude alone among the bundle of rights embraced in the ownership of property has some special sanctity. For, in the sentence immediately following that which was quoted in *Kaiser Aetna* he wrote:

If the property is private, the right of exclusion may be absolute; if the property is affected with a public interest, the right of exclusion is qualified.<sup>19</sup>

(E.) There has, in fact, never been anything like an absolute right to exclude others. The right of exclusion is

<sup>18</sup> The issue in *Pueblo of San Ildefonso* was whether a certain Indian tribe had enjoyed aboriginal title in certain land.

<sup>19</sup> In addition to *Kaiser Aetna*, appellants rely on *Delaware L. & W. R. R. v. Morristown*, 276 U.S. 182 (1928) to support the notion that the "right to exclude" occupies a favored position in the complex of rights in property. *Morristown*, however, does not stand for such a proposition. Rather, it is derived from a series of cases on related questions (see, *Cherokee Nation v. Kansas City Ry. Co.*, 138 U.S. 691, 657; see also *Donovan v. Pennsylvania Co.*, 199 U.S. 279 and cases cited therein) which are all relics from the era when it was thought that no incident of property ownership could be compromised by governmental regulation unless the property in question was "affected with a public interest." Thus, in *Delaware*, the Court approached the issue as one of discovering whether providing taxicab service is part of the business of running a railroad and therefore affected with a public interest; if not, the teaching of the time went, no regulation whatever was permissible, whether of the "right to exclude" or of any other interest in property. Of course, the "affected with a public interest" approach,

simply an incident of property like every other incident of property, and is likewise subject to limitation and to regulation.<sup>20</sup> For, the exceptions to an absolute property right to exclude others have ranged so widely over time and subject matter as to comprehend the entirety of American legal history. In the Seventeenth Century, laws permitted individuals to cross the property of others to reach Great Ponds for fishing. (Smith, *The Great Pond Ordinance — Collectivism in Northern New England*, 30 Boston Univ. L.

has long since been discarded as "little more than a fiction . . . [meaning] no more than that an industry, for adequate reason, is subject to control for the public good," (*Nebbia v. New York*, 291 U.S. 502, 536), and replaced by the very limited "rational nexus" resutiny applicable to all forms of property use. (See *Olsen v. State of Nebraska*, 313 U.S. 236, 244-247; *Ferguson v. Skrupa*, 372 U.S. 726.)

<sup>20</sup> *Andrus v. Allard*, *supra*, decided just one week prior to *Kaiser Aetna*, involved another attribute of the right of private property—the right to dispose of that which is owned. This has been recognized to be a fundamental element of property ownership since Aristotle. (Aristotle, *Rhetoric*, Bk. I, c. 5, § 1361. See also Powell, *The Relationship Between Property Rights and Civil Rights*, 15 Hastings L.J. 132, 140 (1963); Pound, *The Law of Property & Recent Juristic Thought*, 25 A.B.A. J. 993, 997 (1929).) No reason appears why the "right to exclude" should be exalted above the right economically to exploit, also part of the power to use land or the right of disposition. And, of course, limitations upon that latter right are legion in the common law (*e.g.*, the rule against perpetuities and the limitations upon unlawful restraints on alienation).

In *Andrus*, the Court said (in an opinion which all but the Chief Justice joined) that

the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking because the aggregate must be viewed in its entirety. Compare *Penn Central*, *supra*, at 130-131, and *United States v. Twin City Power Co.*, 350 U.S. 222 (1956) with *Pennsylvania Coal Co. v. Mahon*, *supra*, and *United States v. Virginia Electric & Power Co.*, 365 U.S. 624

Rev. 178 (1950).) North and South Carolina at one time required landowners to permit entry for public highways. (Grant, "The 'Higher Law' Background of the Law of Eminent Domain," in 2 Selected Essays on Constitutional Law 912, 925 (1938). In our own time, the State of New Jersey has required a municipally-owned beach to grant access to the sea over its lands to nonresidents (*Borough of Neptune City 1. Borough of Avon-by-the-Sea*, 61 N.J. 296, 294 A.2d 47 (1972), and a farm owner has been held to have to permit access to farm workers who live on his land (*State of New Jersey v. Shack*, 58 N.J. 297, 277 A.2d 369 (1971)).

Perhaps the classic example of imposition by common law of an access right upon private property is the easement by necessity:

The most frequently encountered type of easement by necessity is a right-of-way. When an owner of land conveys to another an inner portion thereof, which is entirely surrounded by lands owned by the conveyor, or by the conveyor plus strangers, a right of access across the retained land of the conveyor is normally found. Without such a finding the conveyed inner portion would have little use, save by helicopter, and helicopters were not a factor in the thinking of the centuries in which this law crystallized. Thus, unless the contrary intent is inescapably reinfested, the conveyee is found to have a right-of-way across the retained land of the conveyor for access to, and egress from, the landlocked

(1961). See also Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1230-1233 (1967). In this case, it is crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds.

It is, to be sure, undeniable that the regulations here prevent the most profitable use of appellees' property. Again, however, that is not dispositive. When we review regulation, a reduction in the value of property is not necessarily equated with a taking [48 LW at 4017.]



parcel. By the middle of the seventeenth century, the finding of an easement by necessity came to be supported also as required by public policy, in order to prevent land from remaining nonusable. This approach ripened into Sergeant Williams' position that easements by necessity originated "by operation of law." [R. Powell & P. Rohan, *Powell on Real Property*, 544 (Abridged Ed. 1968). See Simonton, *Ways By Necessity*, 25 Colum. L. Rev. 571, 572 (1925), tracing the history of this doctrine. See also Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 51 (1964).]

Another major example of a restriction upon exclusive right to control the use of property by others are state laws limiting the right to evict tenants and, indeed, landlord-tenant law generally both common law and statutory. (See *Block v. Hirsh*, 56 U.S. 135 (which involved principally a restriction upon ouster of tenants, and only secondarily control of rents).) Recent statutes, for instance, prohibit eviction of a rent-withholding tenant (e.g., Mass. Ann. Laws., Ch. 239, § 8A; Pa. Stat. Ann., tit. 35, § 1700-1; N.J. Stat. Ann., §§ 2A:42-85, 2A:42-97; Mo. Rev. Stat. §§ 441.500, 441.640).<sup>21</sup>

Closest, perhaps, of all exclusion restrictions to that here involved are the common law and, more recently, statutory restrictions requiring private commercial operations to

<sup>21</sup> Infringements upon the "exclusive use" principle could probably be multiplied indefinitely. A few such restrictions as to which there has been relatively recent litigation include: requiring a land developer to permit private entry by giving up a right of way for a canal (*Wald Corp. v. Metro. Dade County*, 338 So. 2d 863 (Fla. Ct. App., 1976)); requiring an owner to give access across his land to others to permit them to get to public lands, at a price set by government (Cross, *The Diminishing Fee*, 20 Law & Contemp. Problems, 517, 521 (1955)); requiring dedication of a street right of way as a condition for rezoning (*Transamerica Title Ins. Co. v. City of Tucson*, 533 P.2d 693 (Ariz. Ct. App.; 1975)); *State ex rel Myhre v. Spokane*, 70 Wash. 2d 207, 422 P. 2d 790

serve the public generally and not to discriminate, on the basis of race or otherwise, among prospective patrons:

Another common law limitation on property use [other than nuisance] was imposed on innkeepers. It was vital to safeguard travellers at a time when travel was slow, inns were few and highwaymen were numerous . . . The policy reasons were so compelling that the law had to respond by restricting individual property rights. [Hecht, *From Seisin to Sit-In*, 44 Boston U.L. Rev. 435, 453 (1964); see also Powell & Hohan, *supra*, at 956.]

Nonetheless, when Congress, in 1964, chose to forbid private owners of public accommodations from discriminating upon the basis of race among customers, it was accused, as California has been in this case, of compromising an inalienable, absolute aspect of property ownership. This Court gave short shrift to this accusation:

Nor does the Act deprive appellant of . . . property under the Fifth Amendment. . . . There is nothing novel about such legislation. Thirty-two States now have it on their books either by statute or executive order, and many cities provide such regulation. Some of these Acts go back fourscore years. It has been repeatedly held by this Court that such laws do not violate the Due Process Clause of the Fourteenth Amendment. Perhaps the first such holding was in the *Civil Rights Cases* themselves, where Mr. Justice Bradley for the Court inferentially found that innkeepers, "by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them." At 25.

(1967); *City of Redmond v. Kezner*, 10 Wash. App. 332, 517 P. 2d 625 (1974)); granting a fisherman a right to 'trespass' legally (*Elder v. Delcour*, 364 Mo. 835, 269 S.W. 2d 17 (1954)); *Day v. Armstrong*, 362 P. 2d 137 (Wyo., 1961); *Attorney General ex rel. Dir. of Conserv. v. Taggart*, 306 Mich. 432, 11 N.W. 2d 193 (1943)).



As we have pointed out, 32 States now have such provisions and no case has been cited to us where the attack on a state statute has been successful, either in federal or state courts. Indeed, in some cases the Due Process and Equal Protection Clause objections have been specifically discarded in this Court. *Bob-Lo Excursion Co. v. People of State of Michigan*, 333 U.S. 28, 34 (1948). As a result the constitutionality of such state statutes stands unquestioned. . . .

Neither do we find any merit in the claim that the Act is a taking of property without just compensation. The cases are to the contrary. See *Legal Tender Cases*, 12 Wall. 457, 551 (1870); *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923); *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958). [*Atlanta Motel, supra*, 379, U.S. at 258-261.]

In a concurring opinion Mr. Justice Black, too, emphatically rejected the argument of the restaurant and motel proprietors that Congress violated the due process clause of the Fifth Amendment by requiring that they serve Negroes if they serve others:

This argument comes down to this: that the broad power of Congress to enact laws deemed necessary and proper to regulate and protect interstate commerce is practically nullified by the negative constitutional commands that no person shall be deprived of "life, liberty, or property, without due process of law" and that private property shall not be "taken" for public use without just compensation. In the past this Court has consistently held that regulation of the use of property by the Federal Government or by the States does not violate either the Fifth or the Fourteenth Amendment. See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726; *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100; *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365; *Nebbia v. New York*, 291 U.S. 502. A regulation such as that found in Title II does not even come close to

being a "taking" in the constitutional sense. Cf. *United States v. Central Eureka Mining Co.*, 357 U.S. 155, [379 U.S. at 277.]

There is no difference between appellant's exaltation of the "right to exclude" in this case and the Fifth and Fourteenth Amendment contentions in *Atlanta Motel*. In each instance, the required use is compatible with the use to which the owner has determined to put his property; in each instance, the property owner's exploitation of his property is based not on its exclusivity but on its accessibility to the public, and in each instance, because of that accessibility there is no "privacy" interest at stake. Finally, in each instance,

It is doubtful if in the long run appellant will suffer economic loss as a result of the exclusion restriction. . . . But whether this true or not is of no consequence since this Court has specifically held that the fact that a 'member of a class which is regulated may suffer economic losses not shared by others . . . has never been a barrier to such legislation. *Bowles v. Willingham*, 321 U.S. [503], 518 [*Atlanta Motel*, 379 U.S. at 260.]

To revive at this late date the notion that operators of commercial properties open to the public may not constitutionally be required, in rational pursuit of a legitimate state interest, to abide activities and actors they would rather oust would be to reopen basic questions concerning the inviolability of property rights long since put to rest.<sup>22</sup>

<sup>22</sup> Not only the public accommodations portion of the 1964 Civil Rights Act would seem to be endangered if the "right to exclude" was elevated to a preferred constitutional place. Such a ruling would also jeopardize other federal legislation which has been held to grant rights of access to private property. See, e.g., 42 U.S.C. § 1982 as construed in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229; 42 U.S.C. § 1981 as construed in *Runyon v. McCrary*, 427 U.S. 160; § 7 of the National Labor Relations Act.

(F.) Seeking refuge in the special constitutional solicitude accorded violations of rights of free speech, appellants suggest that:

The constitutional rights or private property owners also have their origins in the First Amendment right of the property owner not to be forced by the state to use his property as a forum for the speech of others. [App. Br. 12.]

That appellants cast about for a constitutional haven other than the limited protection accorded property rights as such is not surprising. Indeed, it has become routine for land owners challenging land use restrictions, and hoping to invoke a higher level of review under some new constitutional rubric, to restructure their cases as ones which involve state action impinging on other broader constitutional rights. Courts are then urged to undertake a detailed balancing of interests, to inquire meticulously into the weight of the state interest, and to search out allegedly less costly alternatives, even though this is precisely what the Court declined to do in *Euclid v. Ambler Realty Co. supra*, over fifty years ago.<sup>23</sup>

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as construed in, e.g., *Hudgens v. NLRB, supra*. Moreover, with respect to discrimination in employment statutes such as Title VII of the Civil Rights Act of 1964 and § 8(a)(3) of the NLRA, it is apparent that an employer required to hire an individual must abide his or her physical presence if that requirement is to be meaningful; to that extent, the "right to exclude" has plainly been limited by such legislation.

<sup>23</sup> While the facts are essentially the same, the theories keep changing. For example, in *Construction Industry Association v. City of Petaluma*, 522 F.2d 897 (C.A. 9, 1975), cert. den. 424 U.S. 934 (1976), it was the right to travel. In *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976), it was a denial of due process due to a misuse of the referendum technique. In *Village of Belle Terre v. Boraas*, 416 U.S. 1, the house owners sought to raise the rights of association and of travel.

There may be instances, of course, in which a limitation upon property use so implicates the interests underlying some constitutional provision other than those involving property as such that more exacting judicial scrutiny would be merited.<sup>24</sup> But, in this context the claimed First Amendment right is nothing but the property rights contention—more precisely, the "right to exclude" argument disussed above—masquerading under another name.

That the purported "right not to be compelled by the state to use . . . private property as a forum for the views of others" (App. Br. at 13) has nothing to do with any First Amendment values—and indeed, is the antithesis of those values—can be seen most clearly by considering the following: If appellants operated a private store abutting on a publicly owned sidewalk, appellees and others would, of course, have a First Amendment right to engage in expressive activity in front of appellants' store. (*Hague v. CIO, supra*.) This would be so even if appellants found the message offensive (see *Cohen v. California*, 403 U.S. 15, 21) or simply preferred that their potential customers not be exposed to potential distractions. Appellants cite no case holding that there is a right inhering in the First Amend-

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<sup>24</sup> There is no recent case in which a majority of the Court has accepted the invitation to apply a heightened standard of review to a land use regulation. In *Young v. American Mini Theatres*, 427 U.S. 50 and *Moore v. City of East Cleveland*, 431 U.S. 494, pluralities of the Court did agree that fundamental interests were implicated. However, in *Young* that plurality ultimately declined to find any constitutional infirmity even though the challenged ordinance was directed against a particular form of speech which, it was acknowledged (427 U.S. at 62), was protected by the First Amendment. And in both *Young* and *Moore* there was a concurrence, essential to the judgment, which maintained that the *Euclid* approach was controlling. (See *Young*, 427 U.S. at 73 (Powell, J., concurring); *Moore*, 431 U.S. at 313 (Stevens, J., concurring).)



ment—or in any other constitutional provision—to silence others. And *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, the one case that appears in point, holds that there is no such right.

Yet, it is precisely the right to keep other people from stating their own ideas which appellants here claim. Since they acquired this right, if at all, when they acquired ownership of the Prune Yard, the asserted “right” is traceable solely and exclusively to the acquisition of a property interest. As such, it is merely part of the general “right” traditionally conveyed with a fee interest in property to control use of the property by others for any purpose, expressive or otherwise. But the right of control, we have seen, is regulable by the state in rational pursuit of a valid state interest.

Appellants purport, nonetheless, to find in a handful of this Court’s decisions support for the contention that there is, in fact, a right, conveyed with real property but superior to the ordinary incidents of land ownership, to silence the speech activities of others. In this they err.

Surely, *Board of Education v. Barnette*, 319 U.S. 624 cannot be the source of such a special species of property right: It had nothing to do with property at all, or with silencing others’ speech.<sup>25</sup> Rather, at the core of *Barnette* was

the fixed star in our constitutional constellation . . . that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other

<sup>25</sup> “The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one another and those of another begin. . . . The sole conflict is between authority and rights of the individual.” (*Id.* at 630.)

matters of opinion or force citizens to confess by word or act their faith therein. [*Id.* at 642]

Plainly, this fundamental First Amendment value is not at issue here. California is quite indifferent to what message appellees seek to convey and, indeed, Article I, Section 2, of the California Constitution would itself preclude the state from requiring appellants to provide a forum for some views but not others.

Similarly beside the point is *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241. For, *Tornillo* did not find the right to refuse to publish a reply to the Herald’s editorial in bare property interests alone. To the contrary, it was central to the Court’s conclusion that:

A newspaper is *more* than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time. [*Tornillo, supra*, 418 U.S. at 258 (emphasis supplied).]

Thus, it was not the fact that the Herald owned some property, but the fact that the owners engaged in the First Amendment activity of running a *newspaper* which was critical. Here, appellants are not themselves engaging in any First Amendment activity, and there is consequently no danger whatever of adversely affecting such activity.

The final case in the sequence, and the one upon which appellants most heavily depend, is *Wooley v. Maynard*, 430 U.S. 705. *Wooley* is of a piece with *Barnette*, upon which it strongly relies. Both concern an attempt to require



an individual to convey "the State's ideological message" (*Wooley*, 430 U.S. at 715, emphasis supplied); and in both "the freedom asserted . . . [did] not bring [the claimant] into collision with rights asserted by any other individual" (*Barnette*, 319 U.S. at 630). Moreover, in *Wooley*, the Court, while conceding that "the affirmative act of a flag salute involved a more serious infringement on personal liberties than the passive act of carrying the state motto on a license plate," nonetheless based its decision on *Barnette*, believing that "the difference is essentially one of degree." (430 U.S. at 715.) Thus, the Court understood that to the extent that the interference with the right to be let alone was less obtrusive, *Wooley* extended *Barnette* toward the very limits of its logic.

Appellants now seek to cut *Wooley* entirely lose from its moorings in *Barnette's* rationale and to maintain that its result rests on the proposition that property was used for expressive purposes without the owner's consent. But, as the California Supreme Court recognized, such broad protection for property owners would limit the free speech rights of others and undermine the state's interest in encouraging the interchange of ideas. Moreover, it would have these effects even though the regulation in question is based on the property owner's voluntary decision to open his property to others in a manner that demonstrates that he has no interest in preserving, and no expectation of, a right of privacy.<sup>26</sup> Appellants' mindless extension of the Chief Justice's *Wooley* opinion brings to mind his admonition in an earlier case:

The seductive plausibility of single steps in a chain

<sup>26</sup> Justice Powell's discussion of the right of association argument in *Runyon v. McCrary*, *supra*, is informative here:

As the Court of Appeals said, the petitioning "schools are

of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth "logical" extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance. This kind of gestative propensity calls for the "line drawing" familiar in the judicial, as in the legislative process: "thus far but not beyond." [*United States v. 12 200-ft. Reels of Film*, 413 U.S. 123, 127.]

## II

### **Lloyd Corp. v. Tanner, 407 U.S. 551, Did Not Consider or Decide the Issue of State Authority Presented by This Case**

Appellants center their argument on *Lloyd Corp. v. Tan-*

private only in the sense that they are managed by private persons and they are not direct recipients of public funds. Their actual and potential constituency, however, is more public than private." 515 F.2d, at 1089. The schools extended a public offer open, on its face, to any child meeting certain minimum qualifications who chose to accept. They advertised in the "Yellow Pages" of the telephone directories and engaged extensively in general mail solicitations to attract students. The schools are operated strictly on a commercial basis, and one fairly could construct their open-end invitation as offers that matured into binding contracts when accepted by those who met the academic, financial, and other racially neutral specified conditions as to qualifications for entrance. There is no reason to assume that the schools had any special reason for exercising an option of personal choice among those who responded to their public offers. [427 U.S. at 188.]

This distinction between "acts . . . 'private' in the sense that they involve no state action [and those] . . . 'private' in the sense that they are . . . part of a commercial relationship offered generally or widely and that reflect the selectivity exercised by an individual entering into a personal relationship" is parallel to a distinction between "private property," as to which the right to exclude may have some independent constitutional content and "commercial private" property, as to which the right to exclude is protected only if it is the central aspect of the property exploited.

ner, 407 U.S. 551, which they declare to be "controlling here" (App. Br. 9). That contention rests on a pervasive misunderstanding of the issue in *Lloyd* and of the Court's holding resolving that issue.

(A.) As stated at the outset of Part III of the *Lloyd* opinion, the "basic issue in [that] case" was:

whether respondents, in the exercise of asserted First Amendment rights, may distribute handbills on Lloyd's private property contrary to its wishes and contrary to a policy enforced against all handbilling. [407 U.S. at 567., emphasis in the original.]

By contrast, the issue in this case is whether the Fifth and Fourteenth Amendments preclude the federal and state governments from requiring the owner of a shopping center to permit members of the public to engage in communicative activity there. That issue was not presented in *Lloyd*, because there was no such federal or state law; those who sought access had to rely entirely on the First Amendment. But in the present case the plaintiffs are armed with the authority of the Constitution of the State of California which, as construed by the state's highest court, grants them the right to handbill and circulate petitions in shopping centers even when the centers are privately owned.

The holding of the *Lloyd* decision is commensurate with the issue as there stated.<sup>27</sup> Appellants therefore err in stating that

*Lloyd* held both that the actions of the shopping center owner at issue did not rise to the level of state action

<sup>27</sup> At the outset of the opinion the Court stated the question in somewhat narrower terms:

This case presents the question reserved by the Court in *Amalgamated Food Employees Union v. Logan Valley Plaza*,

because the shopping center in that case was not the "functional equivalent of a municipality", and that federally protected property rights of the owners were paramount under the circumstances presented there. [App. Br. 9]

Appellants misread *Lloyd*, for that case held only the first of these propositions, viz., that "the actions of the shopping center owner at issue did not rise to the level of state action." And since the First Amendment is a limitation only on state action, the Court concluded that the First Amendment does not grant members of the public the right to distribute handbills on Lloyd's privately-owned shopping center. The Court stated its holding as follows:

We hold that there has been no such dedication of Lloyd's privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights. [407 U.S. at 570.]

Our understanding of what *Lloyd* decided is further confirmed by the Court's opinion in *Hudgens v. NLRB*, 424

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391 U.S. 308 (1968), as to the right of a privately owned shopping center to prohibit the distribution of handbills on its property when the handbilling is unrelated to the shopping center's operations. [407 U.S. at 552]

This statement (of which App. Br. 9 presents a misleadingly truncated version) likewise says nothing about the extent of governmental power to require the shopping center to permit handbilling. Rather, it focused on the difference, recognized in *Logan Valley*, and discussed in Part I of the *Lloyd* opinion, between communications which are and those which are not related to the operations of the shopping center on which the communications take place. As thus stated, the issue was even narrower than that stated in Part III, and which was, as the Court explained in a subsequent decision, actually decided in *Lloyd*. (See p. 35-37, *infra*, discussing *Hudgens v. NLRB*, 424 U.S. 507.)

U.S. 507, where the question of the right of members of the public to handbill or picket on a privately-owned shopping center was revisited. The Court quoted *in extenso* what it described as "the ultimate holding in *Lloyd*" (*Id.* at 518).<sup>28</sup> It is clear that *Hudgens* understood *Lloyd* to have held that a shopping center is not the functional equivalent of a municipality (thereby repudiating the premise of *Food Employees v. Logan Plaza*, 391 U.S. 308) and that, therefore, the First Amendment does not provide a right to distribute literature there.

The language of the *Lloyd* opinion on which appellants rely, that dealing with the Fifth Amendment (see App. Br. 9-10), was not included in *Hudgens*' lengthy quotation of *Lloyd*'s "ultimate holding" and was unnecessary to the *Lloyd* decision. For, since the plaintiffs there relied only on the First Amendment as a source of their right of access, the Court's "no state action" holding was sufficient to establish that they were not entitled to relief. Conversely, if the Court had decided the issue in this case—if it had determined, as appellants contend, that the shopping center owner has a paramount Fifth Amendment right to bar communicative activity on its property—there would have been no need for the Court's "no state action" holding.

That the Court did not decide the present issue in *Lloyd*

<sup>28</sup> "The basic issue in this case is whether respondents, in the exercise of asserted First Amendment rights, may distribute handbills on *Lloyd*'s private property contrary to its wishes and contrary to a policy enforced against *all* handbilling. In addressing this issue, it must be remembered that the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on *state* action, not on action by the owner of private property used nondiscriminatorily for private purposes only. . . ." 407 U.S., at 567.

"Respondents contend . . . that the property of a large shopping center is 'open to the public,' serves the same purposes

is further evidenced by its companion case—*Central Hardware Co. v. NLRB*, 407 U.S. 539—as well as by the later analysis in *Hudgens*. In the *Central Hardware* and *Hudgens* cases the National Labor Relations Board had directed the petitioner to permit a union to picket on its property. In both, the Court held, in accord with *Lloyd*, that the union had no such right under the First Amendment. (407 U.S. at 545-548; 424 U.S. at 512-521.) But in both the Court held also that the union might have such a right under § 7 of the National Labor Relations Act, 29 U.S.C. § 157, and remanded the case for consideration of that statutory issue. If the Court in *Central Hardware* and *Hudgens* had understood *Lloyd* to decide that the Fifth Amendment restricts the power of government to require

as a "business district of a municipality, and therefore has been dedicated to certain types of public use. The argument is that such a center has sidewalks, streets, and parking areas which are functionally similar to facilities customarily provided by municipalities. It is then asserted that all members of the public, whether invited as customers or not, have the same right of free speech as they would have on the similar public facilities in the streets of a city or town.

"The argument reaches too far. The Constitution by no means requires such an attenuated doctrine of dedication of private property to public use. The closest decision in theory, *Marsh v. Alabama*, [326 U.S. 501] involved the assumption by a private enterprise of all of the attributes of a state-created municipality and the exercise by that enterprise of semi-official municipal functions as a delegate of the State. In effect, the owner of the company town was performing the full spectrum of municipal powers and stood in the shoes of the State. In the instant case there is no comparable assumption or exercise of municipal functions or power." *Id.*, at 568-569 (footnote omitted).

"We hold that there has been no such dedication of *Lloyd*'s privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights. . . ." *Id.*, at 570 [424 U.S. at 518-520; emphasis in original].



shopping centers to permit picketing or the distribution of literature, the rights and liabilities of the parties would not have been exclusively dependent upon the NLRA, as there held; rather, Central Hardware and Hudgens would have been entitled to judgments denying enforcement of the NLRB's orders on the ground that they were unconstitutional.<sup>29</sup>

(B.) We by no means suggest that the language on which appellants rely was out of place in the *Lloyd* opinion. The due process clauses of the Fifth and Fourteenth Amendments were, as the Court said, "also relevant to [that] case" (407 U.S. at 567) because the basic point of the decision was that property which is opened for public use does not thereby become public property subject to direct constitutional constraints rather than private property.<sup>30</sup> Moreover, since the *Lloyd* plaintiffs could derive no rights against the owners from the First Amendment, the order there requiring that the plaintiffs be permitted to handbill deprived the owners of property without due process of law, that is, without legal authority.

<sup>29</sup> Unlike the National Labor Relations Act, the Fifth Amendment contains nothing to support the distinction between economic strike activity and organizational activity, which the *Hudgens* Court called to the Board's attention. (424 U.S. at 522.)

<sup>30</sup> See also the companion *Central Hardware* case, where in rejecting the argument that *Logan Valley*'s "state action" analysis could be applied to Central's parking lots merely because they were "open to the public" the Court said:

Such an argument could be made with respect to almost every retail and service establishment in the country, regardless of size or location. To accept it would cut *Logan Valley* entirely away from its roots in *Marsh*. It would also constitute an unwarranted infringement of long-settled rights of private property protected by the Fifth and Fourteenth Amendments. We hold that the Board and the Court of Appeals erred in applying *Logan Valley* to this case. [407 U.S. at 539.]

But the conclusion in *Lloyd*, that the property owners' rights under the Fifth and Fourteenth Amendments must prevail in the absence of some law by which the shopping center was bound, is far from a holding, or even a suggestion, that those amendments bar the federal and state governments from enacting laws which would require the owners to permit handbilling on their property. For, as we have previously developed, the Fifth Amendment by no means prohibits all governmental regulation of private property nor does it declare all such regulation to be a taking for which government must provide just compensation. The constitutional limits of this governmental power were not in issue in *Lloyd* and were not addressed in the opinion, let alone decided "on constitutional grounds controlling here" (App. Br. 9).

In short, a decision by this Court that a private party A is not required to accord certain rights to B because A's conduct is not "state action" governed by constitutional limitations, is not a precedent for the proposition that a law which requires A to accord such rights to B is unconstitutional. Mr. Justice Black's separate opinions in the "sit-in" litigation merit particular attention in this connection because of the care with which he drew this critical distinction.

In *Bell v. Maryland*, 378 U.S. 226, and companion cases, the parties and many *amici curiae* vigorously argued the question whether a state may, consistent with the Fourteenth Amendment, convict a Negro for trespass on private property when he has refused to leave a place of public accommodation which refused to serve him because of his race. The Court decided those cases without resolving that question, but it was fully discussed in concurring and dissenting opinions in *Bell*. Mr. Justice Black, joined by Jus-

tices Harlan and White, believed that such convictions were constitutional; the contrary argument relied heavily on *Shelley v. Kraemer*, 334 U.S. 1, and *Buchanan v. Warley*, 245 U.S. 60. Mr. Justice Black reasoned that those precedents, correctly understood, were not in point:

Thus, the line of cases from *Buchanan* through *Shelley* establishes these propositions: (1) When an owner of property is willing to sell and a would be purchaser is willing to buy, then the Civil Rights Act of 1866, which gives all persons the same right to "inherit, purchase, lease, sell, hold, and convey" property, prohibits a State, whether through its legislature, executive, or judiciary, from preventing the sale on the grounds of the race or color of one of the parties. *Shelley v. Kraemer*, *supra*, 334 U.S., at 19. (2) Once a person has become a property owner, then he acquires all the rights that go with ownership: "the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land." *Buchanan v. Warley*, *supra*, 245 U.S., at 74. This means that the property owner may, in the absence of a valid statute forbidding it, sell his property to whom he pleases and admit to that property whom he will; so long as *both* parties are willing parties, then the principles stated in *Buchanan* and *Shelley* protect this right. But equally, when one party is unwilling, as when the property owner chooses *not* to sell to a particular person or *not* to admit that person, then, as this Court emphasized in *Buchanan*, he is entitled to rely on the guarantee of due process of law, that is, "law of the land," to protect his free use and enjoyment of property and to know that only by valid legislation, passed pursuant to some constitutional grant of power, can anyone disturb this free use. But petitioners here would have us hold that, despite the absence of any valid statute restricting the use of his property, the owner of Hooper's restaurant in Baltimore must not be accorded the same federally guaranteed right to

occupy, enjoy, and use property given to the parties in *Buchanan* and *Shelley*; instead, petitioners would have us say that Hooper's federal right must be cut down and he must be compelled—though no statute said he must—to allow people to force their way into his restaurant and remain there over his protest. We cannot subscribe to such a mutilating, one-sided interpretation of federal guarantees the very heart of which is equal treatment under law to all. We must never forget that the Fourteenth Amendment protects "life liberty, or property" of all people generally, not just some people's "liberty," and some kinds of "property." [378 U.S. at 330-332, emphasis in original.]

Thus, the property owner was deemed to have an absolute right to exclude even on the basis of race *unless there is valid legislation which disturbs his free use*, a qualification expressed four times in this single passage.

Congress enacted such legislation in Title II of the Civil Rights Act of 1964, which broadly prohibits "any place of public accommodation" (as defined therein) from discriminating against or segregating any persons on the ground or race, color, religion or national origin. As earlier discussed, in *Atlanta Motel*, *supra*, the Court sustained Title II against the claim, among others, that the Title violates the property owners' rights under the Fifth Amendment. And Mr. Justice Black emphatically agreed in a separate concurrence. What matters for present purposes is that he took pains to contrast his conclusion that Congress was empowered to enact Title II with his

dissenting opinion in *Bell v. State of Maryland*, 378 U.S. 226, 318 in which Mr. Justice Harlan and Mr. Justice White joined, \* \* \* for that opinion stated only that the Fourteenth Amendment in and of itself, without implementation by a law passed by Congress, does not bar racial discrimination in privately owned places



of business in the absence of state action. [379 U.S. at 278.]

Justice Black's opinions in *Bell* and *Atlanta Motel* forcefully state the principle which differentiates this case from *Lloyd Corp. v. Tanner, supra*.<sup>31</sup> It is striking, therefore, that in his *Bell* opinion he also rejected a claim, identical to that of the petitioners in *Logan Valley*, that the trespass convictions violated the First Amendment. In *Bell*, Mr. Justice Black said:

Unquestionably petitioners had a constitutional right to express these views wherever they had an unquestioned legal right to be. Cf. *Marsh v. Alabama, supra*. But there is the rub in this case. The contention that petitioners had a constitutional right to enter or to stay on Hooper's premises against his will because, if there, they would have had a constitutional right to express their desire to have restaurant service over Hooper's protest, is a bootstrap argument. The right to freedom of expression is a right to express views—not a right to force other people to supply a platform

<sup>31</sup> Of course, the decisions of the Court likewise teach that a property owner may be required by positive legislation to do that which the Constitution of its own force does not command. When the *Atlanta Motel* Court sustained the constitutionality of Title II of the Civil Rights Act (see pp. 25-27, *supra*) the decision left unresolved the state action issue which had divided the *Bell* Court.

The *Atlanta Motel* opinion was written by Mr. Justice Clark who had not reached the state action issue in *Bell*, and was joined by Justices Harlan and White who had dissented with Mr. Justice Black.

It is also useful to compare *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (refusal of a private club to serve plaintiff because he was a Negro was not "state action" subject to the equal protection clause of the Fourteenth Amendment) with *Runyon v. McCrary*, 427 U.S. 160 (42 U.S.C. § 1981 constitutionally requires private schools to admit students without discrimination on the basis of race).

or a pulpit. It is argued that this supposed constitutional right to invade other people's property would not mean that a man's home, his private club, or his church could be forcibly entered or used against his will—only his store or place of business which he has himself "opened to the public" by selling goods or services for money. In the first place, that argument assumes that Hooper's restaurant *had* been opened to the public. But the whole quarrel of petitioners with Hooper was that instead of being open to all, the restaurant refused service to Negroes. Furthermore, legislative bodies with power to act could of course draw lines like this, but if the Constitution itself fixes its own lines, as is argued, legislative bodies are powerless to change them, and homeowners, churches, private clubs, and other property owners would have to await case-by-case determination by this Court before they knew who had a constitutional right to trespass on their property. And even if the supposed constitutional right is confined to places where goods and services are offered for sale, it must be realized that such a constitutional rule would apply to all businesses and professions alike. A statute can be drafted to create such exceptions as legislators think wise, but a constitutional rule could as well be applied to the smallest business as to the largest, to the most personal professional relationship as to the most impersonal business, to a family business conducted on a man's farm or in his home as to businesses carried on elsewhere. [378 U.S. at 344-346, emphasis in original.]

This is the core of the position which Justice Black articulated at greater length, and with a fuller discussion of *Marsh*, in his dissent in *Logan Valley*, which was cited approvingly in *Lloyd*, and which ultimately prevailed in *Hudgens*. It provides no comfort to appellants in the present case which comes here on the Supreme Court of California's conclusive determination that the people of the



State of California, a "legislative bod[y] with the power to act" (*cf. Eastlake v. Forest City Enterprises, Inc.* 426 U.S. 668), have drawn just such lines in adopting Article I, Section 2 of the California Constitution. (See p. 2 and p. 3, n.4, *supra*.)

### CONCLUSION

For the foregoing reasons the appeal should be dismissed for want of a substantial federal question; alternatively the judgment of the Supreme Court of California should be affirmed.

Respectfully submitted,

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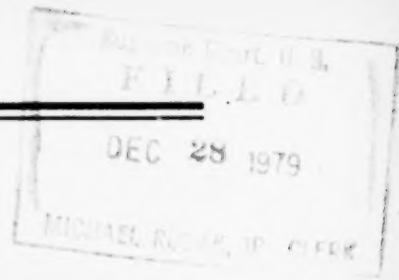
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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1979

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**No. 79-289**

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PRUNEYARD SHOPPING CENTER and FRED SAHADI,  
*Appellants,*

vs.

MICHAEL ROBINS, ET AL.,

*Appellees.*

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ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

---

**BRIEF OF HOMART DEVELOPMENT CO. AS  
AMICUS CURIAE**

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<i>How Shopping Malls Are Changing Life in the U. S.</i> , 74 U. S. News & World Report, pp. 43-46, June 18, 1973 . . . . .	3
King, <i>Supermarkets Hub of Suburbs</i> , New York Times, February 7, 1971, § 1 at p. 58, col. 4-6 . . . . .	3
Shopping Center World, January 1979 . . . . .	3
Weiss, <i>Shopping Center Malls: The Next Place for Teen- age Riots</i> , Advertising Age, April 14, 1969, p. 106 . . . . .	3

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1979

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No. 79-289

---

PRUNEYARD SHOPPING CENTER and FRED SAHADI,  
*Appellants,*

vs.

MICHAEL ROBINS, ET AL.,

*Appellees.*

---

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

---

**BRIEF OF HOMART DEVELOPMENT CO. AS  
AMICUS CURIAE**

---

**INTEREST OF THE AMICUS CURIAE.**

Homart Development Co. ("Homart") is the owner and operator of numerous private shopping centers located throughout the United States. Homart has been a party to three prior disputes involving the identical issue presented by the instant case.<sup>1</sup> Homart has also appeared as an *amicus curiae* before this

1. In the first of those cases, *Diamond v. Bland*, 3 Cal. 3d 653, 407 P. 2d 733 (1970), *cert. den. sub nom., Homart Development Co. v. Diamond*, 402 U. S. 988 (1971) (the Chief Justice and Mr. Justice Blackmun being of the opinion that certiorari should be granted), *rehg. den.*, 404 U. S. 874 (1971), *jt. pet. reh. den.*, 405 U. S. 981 (1972) (the Chief Justice and Mr. Justice Blackmun being

(Footnote continued on next page.)

Court to argue in support of the appeal in this case and to argue related questions in *Taggart v. Weinacker's*, 397 U. S. 223 (1970), and *Lloyd Corp. v. Tanner*, 407 U. S. 551 (1972). The decision below thus presents a recurrent question of substantial interest to Homart.

The issue presented in this case is not limited to merely the solicitation of signatures on a petition to the government in California. Its holding will also apply to a myriad of other "expressive activity" (App. to Jur. Stmt., p. C-6) allegedly protected by California as well as other state constitutions and legislation.<sup>2</sup> Homart, for example, averages three requests each week, for each of its seventeen centers, to use its centers for

(Footnote continued from preceding page.)

of the opinion that certiorari should be granted), *rehg. den.*, 409 U. S. 897 (1972) (hereafter "Diamond I"), the California Supreme Court held that, under the First Amendment to the United States Constitution, the plaintiffs had the right to solicit signatures on an initiative petition and to handbill in connection therewith at one of Homart's shopping centers. This holding was overturned in *Diamond v. Bland*, 11 Cal. 3d 331, 521 P. 2d 460 (1974), *cert. den.*, 419 U. S. 885 (1974), *rehg. den.*, 419 U. S. 1097 (1974), *rehg. den.*, 421 U. S. 972 (1975) (hereafter "Diamond II") where the California Supreme Court held that, by reason of this Court's subsequent decision in *Lloyd Corp. v. Tanner*, 407 U. S. 551 (1972), "the due process clause of the United States Constitution protects the property interests of the shopping center owner from infringement" under either the First Amendment or the California Constitution. 11 Cal. 3d at 335, n. 4. *Diamond II*, in turn, was reversed by the majority of the California Supreme Court in the instant case. The third case in which Homart has been a party is *Homart Development Co. v. Fein*, 110 R. I. 1372, 293 A. 2d 493 (1972), a decision of the Rhode Island Supreme Court that the owner of a shopping center could bar political candidates from soliciting on its premises.

2. All but six states have a free speech clause resembling that incorporated in the California Constitution, with only Hawaii, Massachusetts, Mississippi, New Hampshire, Vermont, and South Carolina retaining a short clause such as that found in the Federal Constitution. Chafee, *Free Speech in the United States*, p. 5, n. 2. In addition, statutory protection could also be enacted. In Illinois, for example, a bill recently passed its Senate (S. 104, 81st Gen. Assy.) expressly sanctioning political campaign literature distribution on private shopping centers. If the decision below is affirmed, adoption of that bill would presumably not violate the Federal Constitution.

non-business related expressive activity. Should the decision below be upheld, it is likely that the number of these requests will significantly increase. In that eventuality, Homart's centers, which now nondiscriminatorily bar all unrelated non-commercial activities, will be forced to assume the burden and concomitant costs of providing forums for all such expressive activity. While the attractiveness of private shopping centers as a place of communication, both peaceful and otherwise, is apparent,<sup>3</sup> such facilities are not the functional equivalent of a municipality and are neither equipped, nor should they be, to provide a public forum for the infinite spectrum of political, social, religious, and economic ideas being espoused today.

The nature of the private property rights that have been appropriated by the decision below are also not confined to shopping centers the size of PruneYard. A "shopping center" can be of practically any size, ranging from local neighborhood centers like PruneYard Center, with but a few independent stores, to large regional centers like that involved in *Lloyd*.<sup>4</sup> Moreover, shopping centers may vary not only by size but also

3. See, e.g., Weiss, *Shopping Center Malls: The Next Place for Teen-Age Riots*, Advertising Age, April 14, 1969, p. 106; King, *Supermarkets Hub of Suburbs*, N. Y. Times, February 7, 1971, § 1 at p. 58, cols. 4-6; *How Shopping Malls Are Changing Life in the U. S.*, 74 U. S. News & World Report, pp. 43-46, June 18, 1973.

4. As of January 1, 1979, there were 19,201 "shopping centers" located in the United States. Of these, only 1.1%, or 203 centers, resembled the "large, multi-level building complex . . . [with] in addition to the stores, . . . parking facilities, malls, private sidewalks, stairways, escalators, gardens, an auditorium, and a skating rink" (*Lloyd*, 407 U. S. at 553) found in *Lloyd*, which encompassed more than one million square feet. The vast majority of "shopping centers," over 12,964 of the total, or 67.5%, are small, self-contained units varying between ten thousand and one hundred thousand square feet, an area no larger than the average supermarket. See, *Shopping Center World*, January 1979, p. 71. As such, most of the "shopping centers" encompassed by the decision below resemble that involved in *Taggart*, i.e., a single retail store containing a supermarket and a small drug department, all owned and operated by the same company, with an adjacent parking lot able to accommodate two rows of automobiles.



by shape. Many department stores, discount houses, stores with leased departments or concessions, and multi-story buildings with shopping facilities, could be equated to shopping centers. Indeed, with the recent outpouring of "expressive activity" on a multitude of non-traditional public sites,<sup>5</sup> it is likely that the private forums established by the decision below would be extended to the smallest business and even to private residences.<sup>6</sup> This Court, in fact, has before it another case involving the question here presented in the setting of union picketing on the sidewalks situated between the store and parking areas of a single, free-standing Sears, Roebuck and Co. facility.<sup>7</sup>

A variety of ownership interests are also at issue, ranging from joint venture arrangements to multiple ownership relationships where several stores within the shopping center own their own premises and parking lots while granting easements to adjacent stores. In many shopping centers, tenant stores pay a

5. See, e.g., *Jones v. North Carolina Prison Union*, 433 U.S. 119 (1977) (prison); *Greer v. Spock*, 424 U.S. 828 (1976) (military base); *Madison School District v. Wisconsin Employment Relations Board*, 429 U.S. 167 (1967) (School Board meeting); *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969) (high school classroom); *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978) (public streets); *Knights of the Ku Klux Klan v. East Baton Rouge School Board*, 578 F.2d 1122 (5th Cir. 1978) (school gymnasium); *Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977) (state capitol grounds); *Wright v. Chief of Transit Police*, 558 F.2d 67 (2nd Cir. 1977) (subway system); *Moore v. Newell*, 548 F.2d 671 (6th Cir. 1977) (retail store); *Sellers v. Regents of the University of California*, 432 F.2d 493 (9th Cir. 1970) (university building); *Women Strike for Peace v. Hickel*, 420 F.2d 597 (D.C. Cir. 1969) (national park); *Powe v. Miles*, 407 F.2d 73 (2nd Cir. 1968) (university football field); and *Wolin v. Port of New York Authority*, 392 F.2d 83 (2nd Cir. 1968) (bus terminal).

6. See, e.g., *Annenberg v. Southern California District Council of Laborers*, 38 C.A. 3rd 637, 113 Cal. Rptr. 519 (4th Dist. 1974).

7. See also, e.g., *Sears, Roebuck and Co. v. San Diego District Council of Carpenters*, No. 79-735, *pet cert. pend.*, on remand from this Court's decision at 436 U.S. 180 (1978). Sears has asked that 79-735 be considered together with the present case so as to "provide the Court with a desirable opportunity to resolve, in a different although equally compelling context, 'arguments . . . [which] are necessarily identical.' *Roe v. Wade*, 410 U.S. 113, 123 (1973)."

portion of the financial costs for the common malls and parking areas in consideration for those areas being designed, used, and maintained exclusively for commercial activity. If, by reason of the decision below, those areas can now be used for non-commercial purposes and their easements obstructed, the decision below will impact significantly on the future development of shopping centers.

In sum, if openness to the public is the touchstone for permitting "expressive activity," as the decision below concluded, this justification "could be made with respect to almost every retail and service establishment in the country, regardless of size or location." *Central Hardware Co. v. N. L. R. B.*, 407 U.S. 539, 547 (1975). Such business establishments "are all open to the public in the sense that customers and potential customers are invited and encouraged to enter. In terms of being open to the public, there are differences only of degree—not of principle—between a free standing store and one located in a shopping center, between a small store and a large one, between a single store with some walls and [one with] . . . elaborate walls and interior landscaping." *Lloyd*, 407 U.S. at 565-66. The decision in this case is thus one that will have far-reaching consequences. It is for this reason that Homart seeks to present its views.

## ARGUMENT.

### A. The Decision Below Violates PruneYard's Rights Under the Fifth and Fourteenth Amendments.

The conflict presented in the instant case between "expressive activity" and PruneYard's right to the free use and enjoyment of its privately maintained commercial property raises an issue identical to that previously considered by this Court in *Lloyd*. In *Lloyd*, as here, the central question was whether the asserted free speech rights "violates rights of private property protected by the Fifth and Fourteenth Amendments." *Lloyd*, 407 U. S. at 553. PruneYard Center, like Lloyd Center, is "a private enterprise" which has neither assumed "all of the attributes of a state-created municipality" or exercised "semi-official municipal functions as a delegate of the State." *Id.* at 569. Absent such assumption of "the full spectrum of municipal powers" (*Hudgens v. N. L. R. B.*, 424 U. S. 507, 519 (1976)), PruneYard had no obligation to permit access for non-commercial, unrelated activities, particularly since "adequate alternative avenues of communication exist[ed]" and PruneYard's "private property [was] used nondiscriminatorily for private purposes only." *Lloyd*, 407 U. S. at 567.

The State in this case has violated PruneYard's Fifth and Fourteenth Amendment rights by appropriating its property without just compensation. In effect, the decision below mandates a permanent physical intrusion on PruneYard's privately maintained commercial property. The physical access provided for expressive activities would be continuing and constant "irrespective of how controversial, offensive, distracting or extensive such conduct may be." *Lloyd*, 407 U. S. at 564, n. 11. PruneYard would be required to provide, free of charge, its valuable commercial facilities to be utilized in a manner that will distract and even drive away those very customers it has attracted to its

facility. Other customers will be enticed to devote their limited shopping time and even their monies to a variety of competing uses. Additional safety problems involving crowd control will arise, and the dangers of violence will be dramatically increased. While a few of the larger shopping centers employ their own security forces, none function as municipal police departments, and most shopping centers, because of their limited size, employ no security force at all. Accordingly, affirmation of the decision below would necessarily have a substantial adverse impact on normal commercial activities and, in effect, mandate a subsidization by the privately owned shopping center of a competing use of its property.

This appropriation of private property creates "a court-made law wholly disregarding the constitutional basis on which private ownership of property rests in this country . . ." *Hudgens*, 424 U. S. at 517, quoting from *Amalgamated Food Employees Union v. Logan Valley*, 391 U. S. 308, 333 (Black, J., dissenting). Although repeatedly called upon to define the permissible scope of "expressive activities" on both private<sup>8</sup> as well as public property,<sup>9</sup> "this Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used non-discriminatorily for private purposes only." *Lloyd*, 407 U. S. at 568. To the contrary, this Court has carefully protected "the Constitutional rights of owners of property" (*Marsh*, 326 U. S. at 509) against "unwarranted infringement." *Central Hardware*, 407 U. S. at 547. It has repeatedly stated that "the Fifth and Fourteenth Amendment rights of private property owners . . . must be respected and protected." *Lloyd*, 407 U. S. at 570.

The court below disregarded these pronouncements. It sought, as the dissent below observed, "to circumvent *Lloyd* by relying

8. See, e.g., *Lloyd v. Tanner*, *supra*; *Amalgamated Food Employees Union v. Logan Valley*, *supra*; *Marsh v. Alabama*, 326 U. S. 501 (1946).

9. See, e.g., *Adderley v. Florida*, 385 U. S. 39 (1966); *Cox v. Louisiana*, 379 U. S. 559 (1965).

upon the 'liberty and speech clauses' of the California Constitution . . . [S]uch an analysis is clearly incorrect, because the owners of defendant PruneYard Shopping Center possess *federally* protected property rights which do not depend upon the varying and shifting interpretations of state constitutional law for their safeguard and survival . . . '[S]upremacy principles would prevent [a state court] . . . from employing state constitutional provisions to defeat defendant's federal constitutional rights.'" App. to Juris. Stmt., p. C-15 (Richardson J., dissenting; emphasis the author's), quoting from *Diamond II*, 11 Cal. 3rd at 335, n. 4. This Constitutional preeminence of private property rights, when balanced against "a trespasser or an uninvited guest[s] assertion of] . . . general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only" (*Lloyd*, 404 U. S. at 568), has also been recognized by post-*Lloyd* decisions of other state courts. See *Lenrich Associates v. Heyda*, 264 Or. 122, 504 P. 2d 112 (1972); *Homart Development Co. v. Fein*, *supra*; *State v. Marley*, 54 Haw. 450, 509 P. 2d 1095 (1973).

Private property rights may be required to yield in certain circumstances to the exercise of "the police power, asserted for the public welfare." *Village of Euclid v. Ambler Realty Co.*, 276 U. S. 365, 387 (1926). The instant case, however, presents a far different situation from one involving public health, safety or moral concerns. There is no assertion here that the State's appropriation of PruneYard's property is required to abate a nuisance or obviate a potential danger to the community's health or safety. Rather, the rationalization of the decision below is a presumed benefit to the public, *i.e.*, "protect[ing] free speech and petitioning" which, it is asserted, "surely matches the protecting of health and safety . . . and other societal goals that have been held to justify reasonable restrictions on private property rights." App. to Juris. Stmt., p. C-9. This contention disregards the acknowledged fact that "PruneYard's policy . . . not to permit any tenant or visitor to engage in publicly expressive activity . . .

that is not directly related to [its] . . . commercial purposes . . . [was] strictly and disinterestedly enforced." App. to Juris. Stmt., p. C-1. It also overlooks the absence in this case, as in *Lloyd*, of both (a) any relationship between the purpose of the "expressive activity" and the business of the owner or tenants of PruneYard Center, and (b) any necessity to permit access in order to provide the Appellees with a reasonable opportunity to convey their message. No attempt was made by the court below to determine the necessity for or reasonableness of the impairment of PruneYard's rights.<sup>10</sup> In such circumstances, a finding that there is an overriding public interest sufficient to appropriate private property resurrects what this Court has previously rejected: "an attenuated doctrine of dedication of private property to public use." *Lloyd*, 407 U. S. at 569. It establishes, as the California Supreme Court admitted (App. to Juris. Stmt., pp. C-7-C-9), a new definition of the power of the State to regulate private property.

Decisions, such as *Hudgens and Eastex, Inc. v. N. L. R. B.*, 437 U. S. 556 (1978), relied upon by the court below (App. to Juris. Stmt., pp. C-4-C-6) likewise provide no support for its decision. While under the National Labor Relations Act, "[i]nconvenience, or even some dislocation of property rights, may be necessary in order to safeguard the rights to collective bargaining,"<sup>11</sup> there is still an obligation that the "[a]ccommodation between the [statutory and property rights] must be ob-

10. Even where general welfare interests are involved, the relationship must be "substantial" and neither "arbitrary" or "unreasonable." *Village of Euclid*, 272 U. S. at 395. The public interests must be "promoted" by the intrusion upon private property rights (*Nectow v. Cambridge*, 277 U. S. 183, 188 (1928)), and the State may not "cut so deeply into a fundamental right normally associated with the ownership of residential property . . . [as to constitute] a taking of property without due process and without just compensation." (*Moore v. East Cleveland*, 431 U. S. 494, 520 (1977) (Stevens, J., concurring)).

11. *N. L. R. B. v. Cities Service Oil Co.*, 122 F. 2d 149, 152 (2nd Cir. 1941). See also *Republic Aviation Corp. v. N. L. R. B.*, 324 U. S. 793 (1945); *N. L. R. B. v. Babcock & Wilcox*, 351 U. S. 105 (1956).



tained with as little destruction of one as is consistent with the maintenance of the other." *Babcock & Wilcox*, 351 U. S. at 112. The locus of this accommodation will necessarily "fall at different points along the spectrum depending on the nature and strength of the respective [statutory] rights and private property rights asserted in any given context." *Hudgens*, 424 U. S. at 522. For example, in the presumably compelling situation of solicitation by nonemployee union organizers on the private property of a facility desired to be organized, only "when the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, [has] the right to exclude from property been required to yield to the extent needed to permit communication of information on the right to organize." *Babcock & Wilcox*, 351 U. S. at 112; see also *Central Hardware*, 407 U. S. at 544-45. Here, however, by contrast, the lower court did not seek to similarly evaluate or accommodate the competing interests of the parties.

The uncompensated appropriation of PruneYard Center's property is also not lessened by, as the California Supreme Court suggests, the adoption of "reasonable regulations" of "time, place, and manner." App. to Juris. Stmt., pp. C-12-C-13. This suggestion requires the property owner to assume the State's responsibility to determine and enforce the appropriate time, place, and manner for the speech activities; to provide the attendant maintenance and security services; and to assume the risk of any potential disruption or damage liability. PruneYard would thus be obligated to exercise "semi-official municipal functions as a delegate of the State" (*Lloyd*, 407 U. S. 569) and have its privately-owned property assume "the functional attributes of public property devoted to public use." *Central Hardware*, 407 U. S. at 547. At the same time, however, that PruneYard had to assume these nebulous obligations, and absorb the concomitant loss of business that would result, there would be no means by which it could, through its own actions, remove the Appellees' source of discontent. As long as the Appellees chose

PruneYard Center as a desirable place to communicate their message, its owners would be forced to suffer the substantial and expensive burdens imposed by that use. Private commercial business was never designed, under our system of free enterprise, to be required to play this role.

**B. By Mandating That Private Property Be Open to Unrelated Expressive Activity, the Decision Below Violates a Property Owner's First Amendment Rights.**

By mandating "an enforceable right of access" to PruneYard Center's private property for the expressive activities of Appellees, the California Supreme Court has created "governmental coercion [which] . . . at once brings about a confrontation with the express provision of the First Amendment." *Miami Herald Publishing Co. v. Tornillo*, 418 U. S. 241, 254 (1974). This Court has long recognized that "the right of freedom of thought protected by the First Amendment against state action includes . . . the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U. S. 705, 714 (1977). Here, as in *Wooley*, the State may not "constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property." *Id.* at 713. In doing so, the State "transcends constitutional limitations on [its] power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 642 (1943).

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette*, 319 U. S. at 642. Here, too, the State, within its own constitutional proscriptions, cannot dictate to PruneYard's owners an enforceable right of access which those owners would otherwise deny. By mandating that PruneYard permit

its property be used for the dissemination of ideas and messages that its owners may not espouse, or wish to disseminate, the State is denying PruneYard's owners their First Amendment rights.

**C. The Decision Below Impermissibly Denies Property Owners Rights Granted by Federal Law.**

Under the National Labor Relations Act, as already noted, employers may exclude non-employee union activities on private property where adequate alternative channels of communication exist. An employer may not, however, discriminate against a union by forbidding its activities while allowing others to engage in similar conduct; such discrimination is forbidden by Section 8(a)(1) of the Labor Act.<sup>12</sup> The decision below, by requiring PruneYard Center to permit *non-union* speech and petitioning on its premises, has thereby concomitantly compelled the Center to forego its federally protected right to exclude *union* speech and petitioning. This result impermissibly regulates conduct encompassed by national labor law. As this Court noted in *Sears, Roebuck and Co. v. San Diego District Council of Carpenters*, 436 U. S. 180, 199-200 (1978), "there is a constitutional objection to state court interference with conduct actually protected by the [Labor] Act. Considerations of federal supremacy, therefore, are implicated . . ."

While PruneYard's Labor Act right to exclude non-employee union speech and petitioning is not a "right" in the sense that it is neither protected nor prohibited by the Labor Act, it is nonetheless "conduct which a State may not prohibit [or frustrate] even though it is not covered by § 7 of the [Labor] Act." *Sears*, 436 U. S. at 199, n. 30. See also, *Lodge 76, IAM v. Wisconsin Employment Relations Commission*, 427 U. S. 132, 138, 140-151 (1977). Congress has indicated, as this

12. See, e.g., *Babcock & Wilcox*, 351 U. S. at 112; *Kern's Bakeries*, 227 NLRB 1329 (1977); *Sunnyland Packing*, 227 NLRB 590 (1976).

Court recently made clear, that in certain situations, notwithstanding that the conduct involved is neither "protected" nor "prohibited" by the Labor Act, "the exercise of state authority" would, nevertheless, "frustrate effective implementation of the policies" of the Act. *New York Telephone Co. v. New York State Dept. of Labor*, \_\_\_\_\_ U. S. \_\_\_\_\_, 99 S. Ct. 1328, 1336 (1979). This aspect of preemption has its "greatest force" where, as here, the state law involved is not a neutral "law of general applicability" but, instead, a law "regulating the relations between employees, their union and their employer." *Sears*, 436 U. S. at 193; see also *New York Telephone*, 99 S. Ct. at 1337-8, 1340-1.

In contrast to *New York Telephone*, California here has directly sought to impose its own substantive regulation of labor-management relations. As in *Teamsters Union v. Morton*, 377 U. S. 252, 260 (1964), the "inevitable result [will] be to frustrate the congressional determination . . . and to upset the balance of power between labor and management expressed in our national labor policy." This is impermissible. California cannot directly thwart federal labor policy.

**CONCLUSION.**

For the foregoing reasons, the decision of the court below should be reversed.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1979

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**No. 79-289**

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PRUNEYARD SHOPPING CENTER, ET AL., *Appellant*,

v.

MICHAEL ROBINS, ET AL., *Appellee*.

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**On Appeal From the Supreme Court  
of the State of California**

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**BRIEF *AMICUS CURIAE* OF THE  
INTERNATIONAL COUNCIL OF  
SHOPPING CENTERS**

---

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PRUNEYARD SHOPPING CENTER, ET AL., *Appellant*,

v.

MICHAEL ROBINS, ET AL., *Appellee*.

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On Appeal From the Supreme Court  
of the State of California

---

**BRIEF AMICUS CURIAE OF THE  
INTERNATIONAL COUNCIL OF  
SHOPPING CENTERS**

---

This brief is submitted with the written consent of counsel to both parties filed with the Clerk of the Court.

**INTEREST OF THE AMICUS CURIAE**

The International Council of Shopping Centers ("ICSC") is the trade association of the shopping center industry. Members of the ICSC, consisting of shopping center developers, owners, operators, tenants, lenders and related enterprises engage in the day-to-day activity of designing, planning, financing, developing, owning and managing shopping centers and their retail stores. The ICSC's 8800 members represent a majority of the shopping centers in the United States.



These members have a clear interest in the disposition of the present case, since the holding in the court below directly challenges the controlling decision of this Court in *Lloyd v. Tanner*, 407 U.S. 551 (1972), on which ICSC members have relied in establishing fair and proper business policies for shopping centers.

Because the decision of the court below in the present case affects the daily management and legal rights of every shopping center in the United States, the ICSC requests that the Court recognize the importance of this case to the business operations of the shopping center industry.

To bring to the Court's attention the views and arguments of the shopping center industry, the ICSC respectfully submits this brief.

### **1. The Decision Below Conflicts Directly With The Controlling Decisions Of This Court.**

This case presents this Court with a question concerning a conflict between the exercise of First Amendment rights and the recognition of Fifth and Fourteenth Amendment property rights of shopping center owners. Specifically, this case raises the issue whether petitioning must be allowed on the premises of a privately-owned shopping center where the petitioning is not related to the operation of the center; the center is not dedicated to public use; the center's restrictions on petitioning are enforced in a non-discriminatory fashion; and other nearby places are available for the petitioning.

This court has previously addressed conflicts between First Amendment rights and property rights in the context of shopping centers. In balancing these rights, this Court has examined the applicability of its holding in *Marsh v. Alabama*, 326 U.S. 501 (1946), to the right of free speech and the rights of shopping center owners in *Amalgamated Food Employees v. Logan Valley Plaza*, 391 U.S. 308

(1968), *Lloyd Corp. Ltd. v. Tanner*, 407 U.S. 551 (1972), and *Hudgens v. NLRB*, 424 U.S. 407 (1976). Each of these cases forms part of an evolutionary process by which this Court has created an analytical framework for balancing First Amendment rights with the private property rights of shopping center owners. A review of this Court's reasoning and approach in each case is relevant to the standards and values applicable to the present case.

In *Marsh* this Court established a foundation for the application of the principles governing the present case. The Court faced the question whether a "State, consistently with the First and Fourteenth Amendments, can impose criminal punishment on a person who undertakes to distribute religious literature on the premises of a company-owned town contrary to the wishes of the town's management." 326 U.S. at 502.

In that case, a member of the religious sect of the Jehovah's Witnesses attempted to distribute religious literature on a sidewalk in front of a post office in the business district of Chickasaw, Alabama. Chickasaw was wholly owned by the Gulf Shipbuilding Corporation. It consisted of a traditional small-town business district, together with residences, streets, sewers, and a sewage disposal plant. The corporation owned all this property, as well as the adjacent and surrounding streets and sidewalks. The only approach to the business district of Chickasaw was over these privately-owned sidewalks and streets which had the appearance of ordinary public streets and which linked the business block to the town's residential areas. In setting out the facts, Justice Black observed that the corporation provided municipal services and owned and controlled the surrounding residential property:

A deputy of the Mobile County Sheriff paid by the company, serves as the town's policeman. Merchants and service establishments have rented the stores and

business places on the business block and the United States uses one of the places as a post office from which six carriers deliver mail to the people of Chickasaw and the adjacent area. The town and the surrounding neighborhood, which cannot be distinguished from the Gulf property by anyone not familiar with the property lines, are thickly settled, and according to all indications the residents use the business block as their regular shopping center. . . In short the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation.

326 U.S. at 502-503.

In discussing the corporation's complete dominance of the residential and business areas of the town, the Court posed the following question:

Can those people who live in or come to Chickasaw be denied freedom of press and religion simply because a single company has legal title to all the town?

326 U.S. at 505.

In answering its own question, the Court emphasized that the corporation controlled all of the town, not merely a piece of private property within the town, and that the citizens of Chickasaw had no other place to exercise their First Amendment rights. The Court was clearly considering an environment in which the private ownership of the town could be used to deprive the town's citizens of the effective exercise of their First Amendment rights. The corporation, through its dominance of the living, working and shopping areas of Chickasaw, could control the information available to the town's citizens. Such control would have been untenable. As the Court noted:

Many people in the United States live in company-owned towns. These people, just as residents of mu-

nicipalities, are free citizens of their State and country. Just as all other citizens they must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored. There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing their freedoms with respect to any other citizen.

The Court then held that the fact that the property from which the Jehovah's Witness was sought to be ejected for exercising her First Amendment rights was owned by a private corporation rather than the State was an insufficient basis to justify the infringement on her right to free expression.

Several distinctions between the present case and the Court's decision in *Marsh* are apparent. The PruneYard Shopping Center, unlike the town of Chickasaw, was not the functional equivalent of a municipality; municipal services were not provided by the PruneYard Shopping Center. The owners of the PruneYard Shopping Center, unlike the owners of the business district of Chickasaw, did not own or control the residential community surrounding the Center or any of the adjacent streets or sidewalks. The PruneYard Shopping Center, unlike the business district of Chickasaw, had nearby places available for the exercise of First Amendment rights; the Center was bounded in part by public streets available to all citizens. The owners of the PruneYard Shopping Center, unlike the owners of Chickasaw, could not deprive the citizens using the Center of their right to be informed. The ownership of the PruneYard Shopping Center, unlike the ownership of Chickasaw, did not mean absolute domination of the citizens using the Center.



More than twenty years after *Marsh*, this Court first addressed a conflict of First Amendment rights and private property rights in the specific context of a shopping center. In *Amalgamated Food Employees v. Logan Valley Plaza*, *supra*, the Court considered the right of union members to picket a non-union supermarket located within the confines of a modern shopping center.

Logan Valley Plaza contained two major retail stores (the Weis Supermarket involved in the litigation and a Sears Roebuck outlet) as well as other, smaller stores, not all of which were operating at the outset of the litigation. The appellants in *Logan Valley* were members of a union of employees of supermarkets and other food-related enterprises. They sought to picket the Weis Market which had opened in Logan Valley Plaza with an entirely non-union staff. The *Logan Valley* opinion therefore addressed the exercise of First Amendment rights on private shopping center property in the specific context of a labor dispute involving a tenant of the shopping center.

On review, this Court held that the union picketers were entitled to exercise their First Amendment rights on the shopping center property since the picketing was directly related to the shopping center's operations.

A review of the Court's rationale for this holding demonstrates that the relationship between the purpose of the exercise of First Amendment rights and the place where these rights are exercised is critical. The Court's opinion in *Logan Valley* went far in finding that Logan Valley Plaza was in many ways equivalent to a central business district. Writing for the majority, Justice Marshall called the shopping center the functional equivalent of the business district of the company-owned town in *Marsh*. Specifically, the Court said:

All we decide here is that because the shopping center serves as the community business block 'and is freely

accessible and open to the people in the area and those passing through,' *Marsh v. State of Alabama*, 326 U.S. at 508, 66 S.Ct. at 279, the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose *generally consonant with the use to which the property is actually put*. (Emphasis added.)

391 U.S. at 319-20

In its footnote to this paragraph, the Court described the meaning of the last, emphasized phrase:

The picketing carried on by petitioners was directed specifically at patrons of the Weis Market located within the shopping center and the message sought to be conveyed to the public concerned the manner in which that particular market was being operated. We are, therefore, not called upon to consider whether respondents' property rights could, consistently with the First Amendment, justify a bar on picketing *which was not thus directly related in its purpose to the use to which the shopping center property was being put*. (Emphasis added.)

391 U.S. at 320.

Thus, although the Court in *Logan Valley* found that the shopping center was similar to a central business district, it did so explicitly within the limited context of picketing aimed directly at the patrons, management and operations of the store located within the shopping center. In the present case, the petitioning activities of the appellees were unrelated to the operation of the PruneYard Shopping Center.

Another compelling distinction exists between the present case and *Logan Valley*. Unlike the present case the Court in *Logan Valley*, as in *Marsh*, was faced with a situation in which the denial of access to private property



would have left the respective parties with virtually no capacity to exercise their First Amendment rights effectively. In *Logan Valley*, the very object of the picketing—the Weis Supermarket—was within the boundaries of the shopping center. Picketing of the store could not have been accomplished effectively outside of the shopping center's boundaries. In the present case, however, there were many places near the PruneYard Shopping Center where the petitioning could have been effectively accomplished.

This distinction was approved by this Court in *Lloyd Corporation, Ltd. v. Tanner, supra*. In that case, this Court decided a case so closely parallel to the present case that the California Supreme Court should have treated it as dispositive. In *Lloyd*, the Appellees, in the enclosed mall area of a shopping center, attempted to distribute handbills inviting people to a meeting to protest the draft and the war in Vietnam. The subject matter of the handbills was not related to the operation of the shopping center or any of its stores. The shopping center had a strict rule against handbilling, on the ground that handbilling was likely to annoy customers. The persons distributing the handbills left the center at the request of the security guards and later filed suit seeking declarative and injunctive relief.

*Lloyd* distinguished *Marsh* on the grounds that the shopping center was not the functional equivalent of a municipality and *Logan Valley* on the grounds that the handbilling activities were not related to the operation of the shopping center.

After distinguishing *Marsh* and *Logan Valley*, the Court in *Lloyd* squarely addressed the question of the property rights of the shopping center owners and stated the central issue of the case:

The basic issue in this case is whether respondents in the exercise of asserted First Amendment rights, may distribute handbills on Lloyd's private property contrary to its wishes and contrary to a policy enforced against all handbilling.

407 U.S. at 567.

In examining this issue, the Court noted that the protection of the rights of free speech and assembly is accomplished under the First and Fourteenth Amendments by restrictions on State action, not on non-discriminatory action by private property owners on private property used for private purposes. Even where the public is invited to use private property, the Court recognized that that property is not necessarily available for the exercise of the rights of free speech.

Nor does property lose its private character merely because the public is generally invited to use it for designated purposes. Few would argue that a free-standing store, with abutting parking space for customers, assumes significant public attributes merely because the public is invited to shop there. Nor is size alone the controlling factor. The essentially private character of a store and its privately-owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center.

407 U.S. at 569.

The Court then balanced the property rights of the PruneYard Shopping Center owners with the rights of speech of the persons distributing handbills, specifically holding:

...the Fifth and Fourteenth Amendment rights of private property owners, as well as the First Amendment rights of all citizens, must be respected and protected. . . We hold that there has been no such dedication of Lloyd's privately owned and operated shop-

ping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights.

407 U.S. at 570.

This holding is equally applicable to the present case; the PruneYard Shopping Center was no more dedicated to public use than the Lloyd Center. It was a privately-owned business property which did not perform municipal functions and which enforced its restrictions on petitioning in an entirely non-discriminatory fashion. In the present case, as in *Lloyd*, other, nearby places were available for the exercise of First Amendment rights; PruneYard Shopping Center, like the Lloyd Center, was bounded in part by public streets available to all citizens.

Four years after the *Lloyd* decision, this Court clarified any conflict between the reasoning in *Lloyd* and the reasoning in *Logan Valley*. In *Hudgens v. NLRB*, *supra*, striking warehouse employees picketed both the warehouse and retail stores of their employer. One of these retail stores was located in a shopping center, and the picketing employees were ordered off the shopping center's property by the shopping center's manager. They departed and filed an unfair labor practice charge with the National Labor Relations Board.

The Court in *Hudgens* addressed the question whether the rights of the parties were to be decided under a First Amendment standard or under the criteria of the National Labor Relations Act. In deciding that the National Labor Relations Act exclusively governed these rights, this Court noted that *Lloyd* rejected and overruled the conflicting aspects of *Logan Valley*:

The Court in its *Lloyd* opinion did not say that it was overruling the *Logan Valley* decision. Indeed a substantial portion of the Court's opinion in *Lloyd* was devoted to pointing out the differences between the two cases, noting particularly that, in contrast to

the handbilling in *Lloyd*, the picketing in *Logan Valley* had been specifically directed to a store in the shopping center and the pickets had had no other reasonable opportunity to reach their intended audience. 407 U.S. at 561-567, 92 S.Ct., at 2225-2228. But the fact is that the reasoning of the Court's opinion in *Lloyd* cannot be squared with the reasoning of the Court's opinion in *Logan Valley*.

... (We) make clear now, if it was not clear before, that the rationale of *Logan Valley* did not survive the Court's decision in the *Lloyd* case. Not only did the *Lloyd* opinion incorporate lengthy excerpts from two of the dissenting opinions in *Logan Valley*, 407 U.S. at 562-563, 565, 92 S.Ct. at 2225-2226, 2227; the ultimate holding in *Lloyd* amounted to a total rejection of the holding in *Logan Valley*...

424 U.S. at 518.

Thus, *Lloyd's* holding that a shopping center owner may bar persons seeking to exercise First Amendment rights on non-business related issues was clearly the law when the present dispute arose.

This law was not following by the Court below. Instead, the Court below in large part based its decision on its finding that the Constitution of the State of California conferred on the Appellees rights which go beyond those conferred by the First Amendment of the U.S. Constitution. To reach this conclusion, the lower court ignored basic principles of the supremacy of Federal law.

The Court below cannot be allowed to use an interpretation of the California State Constitution to deny the federally-protected property rights of the owner of the PruneYard Shopping Center which were clearly enunciated by this Court in *Lloyd*.

Federal property rights cannot depend upon the vagaries of state interpretations of State Constitutional law. In denying these property rights, the Court below erroneously disregarded this Court's clear exposition of the U.S. Constitution.

## 2. The Structure Of The Shopping Center Industry Underscores The Reasonableness Of The Rule In *Lloyd*.

In balancing the conflict between First Amendment rights and private property rights, this Court has not only addressed legal issues but also has given weight to the physical characteristics of shopping centers. This Court's decision in *Lloyd* is affirmed by an analysis of the extremely diverse nature of shopping center industry; the availability of public places near shopping centers for First Amendment activity; the physical problems and dangers inherent in allowing that activity in shopping centers; and the administrative burdens which may be imposed on shopping center owners.

The shopping center industry is extremely diverse; there is no single definition of the term "shopping center." Shopping centers are constructed in many different shapes and sizes: some shopping centers are comprised of single stores along highways; some are comprised of a single row of stores facing a roadway; and some are comprised of the planned development of many retail stores around a central mall.

Within this latter category of shopping centers, there are also several subcategories, which vary greatly in the number of square feet of leasable space within the center. These centers range from a small neighborhood center including one or two department stores, up to a large regional shopping center. This extreme diversity among shopping centers manifests the difficulty in applying a general rule which would permit the exercise of First Amendment rights in all shopping centers. For example, even a breakdown of shopping centers according to gross leasable space discloses a wide range in the size of shopping centers, with the majority of shopping centers with leasable space under 100,000 square feet.

## DISTRIBUTION OF SHOPPING CENTERS BY GROSS LEASABLE AREA

GROSS LEASABLE AREA (IN SQUARE FEET)	% OF ALL SHOPPING CENTERS
Up to 100,000	67.5
100,001 - 200,000	19.3
200,000 - 400,000	7.5
400,001 and over	5.7

Source: *Shopping Center World* (Atlanta: January, 1979 at 71)

Despite this diversity, most shopping centers are bordered by public spaces available for First Amendment activity. This Court in *Lloyd* properly emphasized the availability of places near the Lloyd Center for the distribution of handbills. Like Lloyd Center and PruneYard Shopping Center, most regional shopping centers are also bordered by public streets which can readily serve as the location for the exercise of First Amendment rights. Smaller shopping centers are also likely to be so bordered.

Moreover, an emerging trend in the shopping center industry is toward the development of shopping centers in central cities, in many cases as part of the redevelopment of older central business districts. In these central city locations, most new centers sit side-by-side with other businesses in downtown retail areas, and form part of a traditional "business block," even though they may have special parking facilities and enclosed mall areas. They are also likely to be surrounded by public streets and sidewalks which are available to all citizens.

Additionally, some new and more complex forms of shopping center are being developed. For example, the so-



called "vertical" shopping center may consist of several floors of retail space incorporated into an office building complex. Such shopping centers frequently contain significantly less open space than horizontally constructed shopping centers, and customers generally move floor to floor by elevator or escalator. In these vertical centers, persons who are distributing handbills or gathering signatures can significantly damage the business use of the property by blocking staircases and impeding traffic flow. Such activities can also pose a threat to the safety of customers in crowded hallways and on elevators and escalators.

In most of these vertical centers, the overwhelming portion of the building's floor space is devoted to private office purposes, and the general public is not invited into the entire premises but only to do business with the retail facilities on the lower levels. Frequently, such buildings have a common lobby or entrance area which serves both the stores and the office building; in such a dual-purpose entrance area, the presence of persons obtaining signatures or distributing handbills can damage both the retail and private office building aspects of such a building.

In addition to the difficulties posed by various shopping center structures, this Court should also consider the administrative burdens which may be imposed on shopping center owners. If this Court adopts a rule requiring shopping center owners to allow First Amendment activities on their private property, these owners will also be required to establish and administer appropriate procedures for the exercise of these activities. However, public authorities with control over public property are far better equipped to establish proper procedures for orderly First Amendment activities than are private developers, owners and managers. This is especially true in those cases where the activity may arouse hostile or adverse reactions from passers-by. The establishment of such procedures is better

assigned to municipal officials and police whose conduct is constantly open to public scrutiny than to private landowners whose conduct may be reviewable only by the judicial process.

### CONCLUSION

For all the foregoing reasons and those set forth by the Appellants, the judgment of the Supreme Court of California should be reversed.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1979

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**No. 79-289**

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PRUNEYARD SHOPPING CENTER, *et al.*,  
*Appellants,*

v.

MICHAEL ROBINS, *et al.*,  
*Appellees.*

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On Appeal From The Supreme Court Of California

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**BRIEF AMICUS CURIAE OF THE TAUBMAN  
COMPANY, INC. AND CALIFORNIA BUSINESS  
PROPERTIES ASSOCIATION IN SUPPORT OF  
APPELLANTS**

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---

**OPINIONS BELOW**

The opinions of the Supreme Court of California are reported at 23 Cal.3d 899, 592 P.2d 323, 153 Cal. Rptr. 836, and are reproduced as Appendix C to Appellants' Jurisdictional Statement. The order denying rehearing is reproduced in Appendix D to the Jurisdiction Statement. The opinion of the Court of Appeal of California is unreported; it is reproduced in Appendix B to

the Jurisdictional Statement. The findings of fact, conclusions of law, and judgment of the Superior Court of California are unreported; they are reproduced in Appendix A to the Jurisdictional Statement.

### JURISDICTION

Jurisdiction of this Court exists pursuant to 28 U.S.C. § 1257(2) or 28 U.S.C. § 1257(3) and 28 U.S.C. § 2103. On November 13, 1979, this Court granted review of this appeal postponing the question of jurisdiction to consideration on the merits. — U.S. —; 100 S.Ct. — (1979). The jurisdictional issue is addressed in Point I of this brief, *infra*.

### QUESTIONS PRESENTED

1. May California compel the surrender of Appellants' property for use by strangers—relating to matters totally unconnected with Appellants, tenants, employees, or the property—in direct conflict with this Court's determination in *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), which held that not even the First Amendment (which is not invoked here) can justify such "an unwarranted infringement" of Appellants' Fifth and Fourteenth Amendments Due Process Clause "property rights," 407 U.S. at 567?

2. Does the State's compulsion of Appellants to surrender their property for the purpose of politicking, proselytizing, and picketing on behalf of views not held by Appellants violate both Appellants' First and Fourteenth Amendments free speech rights, as well as their property rights under the Fifth and Fourteenth Amendments Due Process Clauses?

### UNITED STATES AND CALIFORNIA CONSTITUTIONAL PROVISIONS

The Constitution of the United States, Amendment I reads:

Congress shall make no law . . . abridging the freedom of speech or of the press. . . .

The Constitution of the United States, Amendment V reads:

No person shall be . . . deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

The Constitution of the United States, Amendment XIV, § 1 reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Constitution of the State of California, Art. I., § 2 reads:

Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

### INTEREST OF AMICI CURIAE

The Taubman Company, Inc., a Michigan corporation, is one of the largest developers and operators of shopping centers in the United States. It is involved in the operation of a total of eighteen regional retail shopping centers. Those centers are located in the states of California, Connecticut, Illinois, Maryland, Michigan, Nevada, New Jersey, New York, and Wisconsin. The centers contain an aggregate of approximately 2,400 individual retail businesses occupying about 21,800,000 square feet of leasable area. The Taubman Company, Inc. has a continuing interest in the cause herein. It is presently connected with five actions in the State of California involving the issue raised by the instant matter, and participated as amicus curiae in support of Appellants before the California Supreme Court.

California Business Properties Association ("CBPA"), a California non-profit corporation, was formed in 1972. Its membership is comprised of several hundred organizations representing commercial property owners, major retailers, developers, builders, financiers, real estate agents, and professional service corporations. Members are involved in creating redevelopment projects, public and private buildings, and shopping and industrial centers. CBPA members operate nationwide as well as in California. Thirty-two states are represented among the interests and installations of members. CBPA serves as a clearinghouse for information affecting the rights and duties of members and frequently acts to articulate the view of its members, as determined by its Board of Directors. The diminution of private property rights is an issue vitally affecting its membership.

### LETTERS OF CONSENT

The Appellants and Appellees have consented to the filing of this brief amicus curiae and their letters of consent have been filed with the Office of the Clerk of this Court.

### SUMMARY OF ARGUMENT

1. Appellants have constitutionally protected property rights to control the use of their own property, including the right to preclude its use by strangers for politicking, proselytizing, or picketing on issues totally unrelated to Appellants, their property, their tenants, or their employees. Of course, there may be constitutional interests in conflict with the Fourteenth Amendment protection of property and free speech rights. When competing claims do come into conflict, it is for this Court to say which constitutional right should take precedence. In *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), on facts on all fours with this case, this Court determined that, as between a claim to commandeer private property as a free expression forum and the property owners' right to exclude others from use of their property, the Fourteenth Amendment property right prevails. That same Fourteenth Amendment right must prevail, *a fortiori*, where the claim of the usurpers of the property rest not on any federal constitutional right but merely on a state court construction of its own constitution that would take Appellants' property for the use of others without making compensation therefor. If the state court, by an *ipse dixit* that the right doesn't exist, can destroy at will speech and property rights of the Appellants which are protected by the Fourteenth Amendment, then the word "property" will have been read out of the Four-



teenth Amendment's Due Process Clause affording protection to "life, liberty, and property."

2. The State Court, by compelling Appellants to utilize their property for the presentation of views that they do not hold, invaded Appellants' First Amendment rights to freedom of speech as defined by this Court.

#### STATEMENT

This is an action brought by private parties plaintiff against private parties defendant to enjoin defendants from interfering with plaintiffs' use of defendants' property for plaintiffs' selfish purposes. The principal question presented here is exactly that stated by Mr. Justice Powell for the Court in *Lloyd Corp. v. Tanner*, 407 U.S. 551, 552 (1972):

This case presents the question . . . as to the right of a privately owned shopping center to prohibit the distribution of handbills on its property when the handbilling is unrelated to the shopping center's operations.

The facts in this case and in *Lloyd* are as close to being identical as any two cases arising at different times can be. Both cases involve a private shopping center. The Lloyd Center (Lloyd) covers 50 acres and "is crossed in varying degrees by several other public streets." 407 U.S. at 553. The Pruneyard Center (Pruneyard) occupies only 21 acres with no public streets crossing it. Both centers have adjacent public streets. Lloyd has about "60 commercial tenants", an auditorium, and skating rink. *Ibid.* Pruneyard has about 65 shops, a cinema, and restaurants. The Lloyd auditorium, but not its other facilities, was available as

a public forum for civic and charitable organizations and "presidential candidates of both parties." *Id.* at 555. Pruneyard has consistently and without exception refused to lend itself to politicking, picketing, or proselytizing by any political, civic, or religious groups or individuals.

Lloyd has a total ban on "distribution of handbills," because such activity "was considered likely to annoy customers, to create litter, potentially to create disorders, and generally to be incompatible with the purpose of the Center and the atmosphere sought to be preserved." *Id.* at 555-556. For the same reasons, Pruneyard has banned handbilling and solicitation on its premises.

In *Lloyd*, the respondents distributed handbills "to protest the draft and the Vietnam war." *Id.* at 556. They were "quiet and orderly, and there was no littering." *Ibid.* They were told by a security officer that they were "trespassing" and were requested to leave; that they would be arrested if they did not leave; and that they could continue their efforts on the public sidewalks adjacent to the Center, which they did. *Ibid.* Thereafter, the respondents in *Lloyd* filed suit for a declaratory judgment and an injunction to compel Lloyd to allow them the use of its premises for their own purposes.

In the instant case, the Appellees set up a table in the central courtyard of the Pruneyard Center, from which they solicited signatures in support of petitions condemning Syria for preventing Jewish emigration and condemning the United Nations for its resolution on Zionism. As in *Lloyd*, Pruneyard's security personnel informed the Appellees that their conduct was pro-

hibited by Pruneyard, requested them to leave, and suggested the possibility of using the public sidewalks adjacent to Pruneyard for their purposes. Appellees left Pruneyard but made no attempt to use the adjacent public ways for their enterprise. They, too, however, subsequently brought action to compel Pruneyard to make its premises available to them for their private uses.

In *Lloyd*, the respondents had rested their claim of right to use the shopping center for their political purposes on the First Amendment of the United States Constitution. Here, the Appellees—in an attempt to evade the holding of this Court in *Lloyd* that the Fourteenth Amendment protects the private property owner's right to preclude uses of its property by persons having no claim on that property—rested not on the First Amendment, but on Article I, § 2 of the California Constitution, attempting to exalt a dubious construction of a state constitutional provision over the First Amendment and the Fourteenth Amendment as defined by this Court. In both cases, the shopping center defendants relied on the Due Process Clause of the Fourteenth Amendment with its incorporation of the First and Fifth Amendments. Unlike *Lloyd*, in this case the Appellant also asserted their own free speech rights under the First Amendment.

In *Lloyd*, this Court held that the intruders' claimed rights to freedom of expression could not justify the taking of Lloyd's property for respondents' private use. Here, reversing the rulings of the trial court and the intermediate appellate court, and overruling an earlier decision of its own rejecting similar state constitutional claims, *Diamond v. Bland*, 11 Cal.3d 331, 335 n.4, 521 P.2d 460, 463 n.4 (1974), *cert. den.*, 419

U.S. 885 (1974), the California Supreme Court, divided four to three, held that Article I, § 2 of the California Constitution created a "right" in strangers to commandeer the Appellants' private property and that this right was superior to the rights protected by the Due Process Clause of the Fourteenth Amendment of the United States Constitution. This appeal followed. On November 13, 1979, this Court undertook to hear the appeal, postponing consideration of its jurisdiction to consideration of the merits. — U.S. —; 100 S.Ct. — (1979).

## ARGUMENT

### I.

#### **This Court Has Jurisdiction Over This Appeal**

This Court has jurisdiction over this appeal under 28 U.S.C. § 1257(2). The Supreme Court of California purported to hold that Art. I, § 2, of the California Constitution was applicable to this case and supported Appellees' claims against Appellants' contentions that such application of Art. I, § 2 was invalid as violative of the First, Fifth, and Fourteenth Amendments to the Constitution of the United States. Thus, on the California court's rationalization of its conclusion, jurisdiction attaches in this Court under 28 U.S.C. § 1257(2). *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 61 n.3 (1963); *Cohen v. California*, 403 U.S. 15, 17-18 (1971), all cited in Stern & Gressman, *Supreme Court Practice* 163 (5th ed., 1978). A state constitutional provision is a state "statute" within the meaning of § 1257(2). See, e.g., *Railway Express Agency v. Virginia*, 282 U.S. 440 (1931); *Adamson v.*

*California*, 332 U.S. 46 (1947); *Torcaso v. Watkins*, 367 U.S. 488 (1961); *Stern & Gressman*, *supra*, at 160 n.2.

If, however, the real explanation of the decision below was not that the court relied on a state constitutional provision to deny a federal constitutional claim, but that it sought to redefine state common law of property, jurisdiction would be present in this Court pursuant to 28 U.S.C. § 1257(3), which is required to be invoked by the terms of 28 U.S.C. § 2103.

There is no reading of the California Supreme Court decision that can avoid the fact that its judgment rejected two claims of Appellants patently resting on provisions of the national Constitution: their entitlement to the protection of their property rights under the Fifth and Fourteenth Amendments and the protection of their free speech rights under the First and Fourteenth Amendments.

## II.

**Appellants' Constitutionally Established Right Under The Fourteenth Amendment To Exclude Appellees From Adverse Use Of Appellants' Private Property Cannot Be Denied By Invocation Of A State Constitutional Provision Or By Judicial Reconstruction Of The State's Law Of Private Property.**

In *Kaiser Aetna v. United States*, — U.S. —, 100 S.Ct. —; 48 L.W. 4045 (Dec. 4, 1979), this Court reiterated the longstanding constitutional rule that: "An essential element of individual property is the legal right to exclude others from enjoying it." *International News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting), quoted in *Kaiser Aetna*, 48 L.W., at 4049, n. 11. In *Kaiser Aetna*, the court ruled: "In this case, we hold that the

'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that a Government cannot take without compensation." *Id.* at 4049. The Court here quoted from *Chicago, R.I. & P.R. Co. v. United States*, 284 U.S. 80, 96 (1931): "Confiscation may result from a taking of the use of property without compensation quite as well as from the taking of title." 48 L.W. 4048 n.8. Cf. Mr. Justice Black dissenting in *Amalgamated Food Employees v. Logan Valley Plaza*, 391 U.S. 308, 330-331 (1968).

It was exactly this right of property under the Fourteenth Amendment that was held in *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), to take precedence over claimed rights of strangers to the property to freedom of expression in circumstances exactly parallel to those of this case. In *Lloyd*, the question was stated thus: "We grant certiorari to consider petitioner's contention that the decision below violates rights of property protected by the Fifth and Fourteenth Amendments." 407 U.S. at 552. The Court resolved the question of balancing alleged rights to freedom of expression against this established constitutional right of private property, *id.* at 567-568, 570:

[I]t must be remembered that the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on *state* action, not on action by the owner of private property used nondiscriminatorily for private purposes only. The Due Process Clauses of the Fifth and Fourteenth Amendments are also relevant to this case.

They provide that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." There is the further proscription



in the Fifth Amendment against the taking of "private property . . . for public use, without just compensation."

Although accommodations between the values protected by these three Amendments are sometimes necessary, and the courts properly have shown a special solicitude for the guarantees of the First Amendment, this Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only.

.....

We do say that the Fifth and Fourteenth Amendment rights of private property owners, as well as the First Amendment rights of all citizens, must be respected and protected. The Framers of the Constitution certainly did not think these fundamental rights of a free society are incompatible with each other. There may be situations where accommodations between them, and the drawing of lines to assure due protection of both, are not easy. But on the facts presented in this case, the answer is clear.

Thus, this Court, in *Lloyd*, has established that the balance between the constitutional interests in free expression and the constitutional interests in private property rights to exclude must be struck in favor of the property right in a factual situation just like this one. If the federal right to free expression is an inadequate basis for destroying the Fourteenth Amendment property right, *a fortiori*, state law supporting free expression must be subordinated to the federal constitutional protection.

State courts have recognized the obligation to abide by this Court's determination of this issue. Indeed, the

California Supreme Court originally did so when the same claim of state law superiority was first proffered to it. In *Diamond v. Bland*, 11 C.3d 331, 335, 521 P.2d 460, *cert. den.*, 419 U.S. 885 (1974), the California Supreme Court said:

*Lloyd's* rationale is controlling here. In this case, as in *Lloyd*, plaintiffs have alternative, effective channels of communication, for the customers and employees of the center may be solicited on any public sidewalks, parks and streets adjacent to the Center and in the communities in which persons reside. Unlike the situation in *Marsh* and *Logan*, no reason appears why such alternative means of communication would be ineffective, and plaintiffs concede that, unlike *Logan*, their initiative petition bears no particular relation to the shopping center, its individual stores or patrons. Under these circumstances, we must conclude that defendants' private property interests outweigh plaintiffs' own interest in exercising First Amendment rights in the manner sought herein.

In *Diamond*, too, the argument was made by the dissenters that the state constitutional protection for free speech afforded a ground for avoiding the clear meaning of *Lloyd* which, on balancing the interests in free speech against the interests in private property, ruled in favor of the Fourteenth Amendment property interests.

So, too, in *Lenrich Associates v. Heyda*, 264 Ore. 122, 504 P.2d 112 (1972), where plaintiffs pressed both rights under the First Amendment and rights under the state constitutional provisions guaranteeing freedom of expression. "The issue in this case, as in *Tanner*, is the extent to which plaintiff's rights as property owner can be infringed in favor of the rights

of the public to free speech and freedom of expression. In the absence of any significant factual difference the decision in *Tanner* is controlling and requires that this case be reversed." 264 Ore. at 129.

State courts have in the past sought to shift from a rationale held not to justify the state action in order to evade the obligation to abide by this Court's judgment on constitutional law. Thus, this Court said in *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190, 191 (1960), where the state courts attempted a revision of the state's property law to avoid an earlier Supreme Court ruling:

As the opinions of the [New York] Court of Appeals make evident . . . the [state court] decision now under review rests on the same premises which were found to have underlain the enactment of the statute struck down in *Kedroff*. 344 U.S., at pages 117-118. But it is established doctrine that "[i]t is not of moment that the State has here acted solely through its judicial branch, for whether legislative or judicial, it is still the application of state power which we are asked to scrutinize." *N.A.A. C.P. v. Alabama*, 357 U.S. 449, 463. See *Shelley v. Kraemer*, 334 U.S. 1, 14-16, and cases there cited. Accordingly, our ruling in *Kedroff* is controlling here, and requires dismissal of the complaint.

It must not be forgotten that what the court below seeks to do is to deny Appellants a right held by this Court to have been guaranteed them by the Fourteenth Amendment of the United States Constitution. As this Court said in *Cooper v. Aaron*, 358 U.S. 1, 18, 19 (1958):

Article VI of the Constitution makes the Constitution the "supreme Law of the Land." . . .

It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." . . .

It is, of course, quite true that the responsibility for public education is primarily the concern of the States, but it is equally true that such responsibilities, like all other state activity, must be exercised consistently with federal constitutional requirements as they apply to state action.

This Court in *Lloyd* solemnly proclaimed that the Fourteenth Amendment affords property owners protection against the taking of their property at the command of the State court for the use of others, where these strangers were asserting rights of freedom of expression. That judgment must be binding on the California courts as well as all others.

As Mr. Justice Douglas said in his dissent in *N.A.A. C.P. v. Overstreet*, 384 U.S. 118, 123 (1966):

This case thus carries us into territory in which principles of state law must be accommodated with overriding federal precepts. . . . [W]hen a state policy thwarts interests which the Federal Constitution affords special protection, that state policy must yield.

Nor does it make a difference that what is involved here are Fourteenth Amendment property rights in conflict with state judicial pronouncements denying those rights. "[I]t would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries de-



fined by the Fourteenth Amendment." *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948). And, as this Court said in *Lynch v. Household Finance Corp.*, 405 U.S. 538, 544 (1972): "Acquisition, enjoyment, and alienation of property were among" the civil rights protected by the Fourteenth Amendment.

It may be that, given different factual circumstances, Appellants' constitutional property rights could be subordinated to competing constitutional commands, as where the evicting party was engaged in the exercise of a sovereign government function, e.g., *Marsh v. Alabama*, 326 U.S. 501 (1946); see also *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 161-64 (1978); and *Jackson v. Metropolitan Edison Co.*, 419 U.S. 346 (1974); or where the property sought to be utilized for proselytizing is public property, e.g., *Tucker v. Texas*, 326 U.S. 517 (1946); but see, e.g., *Adlerley v. Florida*, 385 U.S. 39 (1966); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974); *Greer v. Spock*, 424 U.S. 828 (1976); or where the seizers of the property of others are using it as a forum to express arguments in their controversy with the owners or tenants, e.g., *Amalgamated Food Employees v. Logan Valley Plaza*, 391 U.S. 308 (1968); *Central Hardware Co. v. N.L.R.B.*, 407 U.S. 539 (1972); *Hudgens v. N.L.R.B.*, 424 U.S. 507 (1976); *Eastex, Inc. v. N.L.R.B.*, 437 U.S. 556 (1978). But in the instant case, there is no expression of views by persons in conflict with the proprietors of the property, nor public property, nor are the Appellants exercising any sovereign governmental function. In the absence of any of these bases for rejecting the Fourteenth Amendment protection of a private property owner's right of exclusion, the court below was required to deny the injunction invading Appellants' constitutional property rights.

Finally, it should be noted that the judicial scales should have on them not only Appellees' claims to free expression, on the one side, and Appellants' Fourteenth Amendment property claims, on the other. There is another weight to be placed on Appellants' side of the scales: their Fourteenth Amendment free speech rights, free speech rights endorsed by this Court under the First Amendment. This Court said, only recently, in *Wooley v. Maynard*, 430 U.S. 705, 714-715 (1977):

We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. . . . A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind." . . . This is illustrated by the recent case of *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, where we held unconstitutional a Florida statute placing an affirmative duty upon newspapers to publish the replies of political candidates whom they had criticized.

In this case, the California Supreme Court has placed an affirmative duty on Appellants to afford to any individual or group who chooses to seize Appellants' private property for their own use, a forum for the publication of views that are not their own. Thus, not only are Appellants' property rights destroyed, but also their First Amendment right not to sponsor positions that are not theirs, in the name of a Califor-



nia constitutional provision never heretofore construed to command this result.

To allow a state court to subordinate Appellants' Fourteenth Amendment rights to such an *ad hoc* construction of a state constitutional provision, or to allow the state court to redefine property rights for each case that comes before it, would be to amend the United States Constitution by removing the word "property"—and some part of the word "liberty"—from the Due Process Clause of the Fourteenth Amendment. There is no authority in the courts, state or federal, to emend the Constitution in this fashion.

#### CONCLUSION

For the reasons heretofore set out, this Court should reverse the judgment below and restore to Appellants the constitutional rights taken from them by the California Supreme Court.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**  
October Term, 1979

**No. 79-289**

PRUNEYARD SHOPPING CENTER  
and FRED SAHADI,

*Appellants,*

*v.*

MICHEL ROBINS, *et al.*,

*Appellees.*

On Appeal from the Supreme Court  
of the State of California

**BRIEF OF THE AMERICAN JEWISH CONGRESS  
AND THE SYNAGOGUE COUNCIL OF  
AMERICA AS *AMICI CURIAE***

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**BRIEF OF THE AMERICAN JEWISH CONGRESS  
AND THE SYNAGOGUE COUNCIL OF  
AMERICA AS *AMICI CURIAE***

---

**Interest of the *Amici***

This brief is submitted on behalf of the American Jewish Congress and the Synagogue Council of America as *amici curiae*.

The American Jewish Congress is a national organization of American Jews founded in 1917 to protect the reli-

gious, political, civil and economic rights of Jews and to promote the principles of democracy. As a human rights organization, the American Jewish Congress has come before this Court on numerous occasions to defend the civil rights and civil liberties of Jews and all Americans.

The Synagogue Council of America is a co-ordinating body consisting of the organizations representing the three divisions of Jewish religious life: Orthodox, Conservative and Reform. It is composed of the Central Conference of American Rabbis, representing the Reform rabbinate; the Rabbinical Assembly of America, representing the Conservative rabbinate; the Rabbinical Council of America, representing the Orthodox rabbinate; the Union of American Hebrew Congregations, representing the Reform congregations; the Union of Orthodox Jewish Congregations of America, representing the Orthodox congregations; and the United Synagogue of America, representing the Conservative congregations.

Our interest in this suit is twofold. First, as Jews we have a commitment to the preservation of the State of Israel—a commitment which, though shared by the Government of the United States and the great majority of Americans, is nevertheless particular to American Jewry. Hence we are concerned with any judicial decision which interferes with the ability of American Jews to speak effectively about and to petition against the United Nations resolution condemning Zionism. Second, in a broader sense, we are committed to the freedom secured by the First Amendment to the United States Constitution and by the states' constitutional counterparts of that Amendment.

### Statement of the Case

Appellant Fred Sahadi is the sole owner of the appellant Pruneyard Shopping Center [hereinafter sometimes referred to collectively as "Pruneyard"], a shopping center located in a suburb of San Jose, California. The center consists of approximately 21 acres—five devoted to parking and 16 occupied by walkways, plazas, and buildings that house 65 shops, 10 restaurants, and a cinema. The public is invited to visit for the purpose of patronizing these businesses, but no effort is made to exclude those who enter the center without intending to patronize any of the businesses there.

Appellees are students at confirmation classes at Temple Emanu-El in San Jose, who, with their teacher, as a class project, sought to collect signatures for a petition in opposition to the United Nations resolution condemning Zionism as a form of racism. The students set up a table in a corner of Pruneyard's central square. They harassed no one at the center, blocked no business entrances, and acted in a courteous and orderly manner.

Soon after they had begun soliciting, a member of Pruneyard's security force informed them that their conduct violated Pruneyard regulations. Appellees spoke to the officer's superior, who upheld the officer's action and advised them that, while they had to leave the premises, they could continue their solicitation on the public sidewalk outside the center's perimeter. This suggestion was rejected since, as a practical matter, they could obtain signatures for their petition only if they could present it to



persons who had already parked their cars in Pruneyard's parking lots.

Appellees instituted a proceeding in the Superior Court of California for an injunction establishing their right to solicit the public on Pruneyard's premises. In the trial court, the students introduced evidence of the socio-economic circumstances existing in California which made access to shopping centers necessary for the effective exercise of the right, guaranteed by the state constitution, to petition the government for redress of grievances. This evidence tended to prove that, in California, privately-owned shopping centers are public gathering places, and that shopping centers, because of their convenience, wide range of goods and services, and attractiveness to businesses which formerly were situated in downtown areas, not only had replaced the traditional public forums but were the principal cause of their demise. Viewing itself as bound by existing California precedent, the trial court ruled against the students. That decision was affirmed by the California Court of Appeals.

The Fair Political Practices Commission, an administrative agency established by the legislature to oversee the state's electoral processes, appeared before the Supreme Court of California as an *amicus curiae*, and urged the court to rule in favor of the students. The Supreme Court of California did so, overruling an earlier decision and adopting the position of the state regulatory body that "because of the large number of signatures required to succeed in an initiative, referendum or recall drive, guaranteeing access to voters is essential to make meaningful the right to mount such a drive." (Jurisdictional State-

ment, p. c-9, n. 4). The court rejected Pruneyard's claim that permitting solicitation on its premises violated its Fourteenth Amendment free speech and property rights.

### **Federal and State Constitutional Provisions Involved**

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The Fourteenth Amendment to the United States Constitution provides: "... [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

Article I, Section 2 of the California Constitution provides: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

Article I, Section 3 of the California Constitution provides: "[P]eople have the right to . . . petition government for redress of grievances."

### Questions to Which This Brief Is Addressed

1. Is a shopping center in contemporary California a public forum where free expression is protected by the United States Constitution?

2. Does California's recognition of a state constitutional right to gather signatures for a petition at a privately-owned shopping center deprive the shopping center owner of liberty or property without due process of law?

### Summary of Argument

In certain circumstances, free speech activities on private property are protected under the First Amendment. The company town, because it bears the attributes of a public forum, is one such place. For a period of time, this Court recognized that privately-owned shopping centers, like company towns, are places where free speech activities are constitutionally protected. The company town doctrine should once again be extended to the contemporary shopping center, the modern equivalent of the traditional public forum.

The Supreme Court of California has recognized a free speech right which is broader than the free speech guarantee of the First Amendment to the United States Constitution. Implicit in the nature of a federal form of government, and explicit in the terms of the Tenth Amendment to the United States Constitution, is the authority of the states to accord a broader recognition of civil rights and civil liberties than that mandated by the national constitution.

The right to solicit signatures for a petition at a privately-owned shopping center, a right which derives from several provisions of the California constitution, does not deprive the appellants of liberty or property without due process of law. What property rights inhere in ownership of a shopping center is primarily a question of state law. The Supreme Court of California has held that an owner of a shopping center has no property right to exclude persons who seek to solicit there.

Even if this Court were to find that appellants retain a property right sufficient to invoke the protection of the Fourteenth Amendment's Due Process Clause, it must balance that interest against the free speech right created in the appellees by virtue of the state constitution. The free speech rights at issue are important ones, ones deemed essential to the California form of government. The intrusion on property rights is minimal. The balance struck by the court below was a reasonable one. Accordingly, the decision of the Supreme Court of California should be affirmed.

### ARGUMENT

#### I.

**A shopping center in contemporary California is a public forum where free expression is protected by the United States Constitution.**

On several occasions, this Court has considered the question of when activities on private property are protected under the free speech clause of the First Amendment. *Mars v. Alabama*, 326 U.S. 501 (1946), presented a challenge to a state law making it a crime to enter or

remain on private premises after being warned by the owner not to do so. The law was applied against a Jehovah's Witness who distributed religious literature in the streets of a company-owned town in disregard of a posted company rule which read: "This Is Private Property, and Without Written Permission, No Street, or House Vendor, Agent or Solicitation of Any Kind Will Be Permitted."

The town, a suburb of Mobile, Alabama, known as Chickasaw, was entirely owned by the Gulf Shipbuilding Corporation. Except for that fact, it had all the characteristics of any other town; it consisted of residences, streets, sewers, and a "business block" for stores, restaurants and a cinema. All residents of the town were company employees and their families, but the streets and stores of the town were open to all persons.

In holding that the statute could not constitutionally be enforced against the Witness, the Court ruled (326 U.S. at 506-09):

Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. . . . [People who live in company towns], just as residents of municipalities, are free citizens of their State and country. Just as all other citizens they must make decisions which affect the welfare of community and nation. To act as good citizens, they must be informed. In order to enable them to be properly informed their information must be uncensored. There is no more reason for depriving these people of the liberties guar-

anteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizens.

When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position. . . . In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a State statute. [footnotes omitted]

The company town in *Marsh* and the suburban shopping center of today are strikingly similar. Indeed, in 1968, this Court, in *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 319-20 (1968), held that:

because the shopping center serves as the community business block and "is freely accessible and open to the people in the area and those passing through," . . . the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put.

Four years later, this Court nevertheless ruled that a privately-owned and operated shopping center had not been so dedicated to public use so as to entitle persons to there distribute handbills unrelated to the shopping center's operations. *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551 (1972).



While not expressly overruling *Logan Valley*, the *Lloyd* decision drew into question the continued validity of *Logan Valley*. Finally, in *Hudgens v. NLRB*, 424 U.S. 507 (1976), a majority of this Court held that *Logan Valley* could not be squared with *Lloyd* and that the former case was overruled.

We respectfully submit that *Lloyd* and *Hudgens* were wrongly decided and that *Marsh* should once again be extended, as it was in *Logan Valley*, to the contemporary shopping center. To recognize again that *Marsh* is applicable to suburban shopping centers would be a considerably less significant advancement of freedom of expression than was *Marsh* when it was decided. That traditional property law recognized a difference between public and private property, did not prevent the *Marsh* Court from holding that this distinction could not bar enjoyment of First Amendment rights by residents of a town wholly owned by a corporation. Applying the *Marsh* principle to shopping centers only acknowledges the reality that they are, in a highly mobile society, today's equivalent of company towns.

We recognize that the company town in *Marsh* differs from the suburban shopping center in that individuals do not live in the latter. Widespread ownership of automobiles has made it possible to separate one's place of residence from necessary commercial and public facilities. This difference, however, does not justify a different rule for shopping centers than for company towns.

The Constitution, including the First Amendment, is a living document, designed to meet the needs of an evolving society. This was the sociological basis of *Marsh*—an

awareness of the social role the company town played in the nineteenth and earlier years of the twentieth century. The Supreme Court of California has found that perhaps the most common of the traditional public forums, central business districts, have yielded their functions to suburban shopping centers. That finding is fully supported by statistical data which was introduced at trial and which was cited at length in the decision of the Supreme Court of California. This Court should recognize that the twentieth century shopping center is the modern equivalent of the Greek agora and that First Amendment guarantees must be afforded at these modern day public forums.

## II.

**California's recognition of a state constitutional right to gather signatures for a petition at a privately-owned shopping center does not deprive the shopping center owner of liberty or property without due process of law.**

**A. The United States Constitution recognizes the authority of the states to guarantee greater free speech protection than the Constitution itself guarantees.**

The State of California, through its Supreme Court, has recognized appellees' right, derived from the California Constitution, to solicit signatures on a matter of public interest at a shopping center. That right, as authoritatively construed by the Supreme Court of California, is protected under the California Constitution's freedom of speech and right to petition clauses (Article I, §2; Article I, §3).

*Lloyd Corp., Ltd. v. Tanner, supra*, if it be deemed still viable, stands for the proposition that there is no federal constitutional right under the First Amendment to engage in such activity in a privately-owned shopping center. However, that the freedom of speech guaranteed by the California Constitution is broader than the free speech guarantee of the First Amendment to the United States Constitution, does not, in and of itself, render California's free speech protection susceptible to federal constitutional challenge.

Implicit in the nature of a federal form of government, and explicit in the terms of the Tenth Amendment, is the authority of the states to accord broader protection to civil rights and civil liberties than that mandated by the national constitution. See generally, Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. J. 489 (1977). Numerous instances can be cited in support of this principle of federalism. For example, this Court has ruled that no federal constitutional right is infringed by zoning ordinances which exclude houses of worship and parochial schools from areas restricted to residential uses. *Corporation of Presiding Bishop v. City of Porterville*, 90 Cal. App. 2d 656, 203 P.2d 823, *appeal dismissed for want of substantial federal question*, 338 U.S. 805 (1949); *State ex rel. Wisconsin Lutheran High School Conference v. Sinar*, 267 Wis. 91, 65 N.W. 2d 43 (1954), *appeal dismissed for want of substantial federal question*, 349 U.S. 913 (1955). That fact, however, does not prevent state courts from construing and applying their own constitutional equivalent of the Free Exercise Clause as barring such exclusionary zoning ordinances. *Beit Havurah v. Zoning Board of Appeals*, — Conn. —, — A.2d —, 40 Conn. L.J. 45 (May 8, 1979).

Racial restrictive covenants present another example. Before this Court, in *Shelley v. Kraemer*, 334 U.S. 1 (1948), held that enforcement of those covenants was violative of the federal Constitution, some state courts interpreted their own constitutions as barring their enforcement. See, e.g., *Yoshida v. Gelbert Improvement Co.*, 58 Pa. D. & C. 321 (Del. Cty. 1946). It was not then claimed nor could it have been argued that the courts in these states in so holding, violated any property rights of other signatories to the covenant. Other instances might be cited, but we believe that enough has been shown to establish the proposition that it is constitutionally permissible for a state to interpret its own equivalent of First Amendment rights more broadly than this Court has interpreted the provisions of the Amendment itself.

**B. The right to solicit signatures for a petition at Pruneyard does not violate Pruneyard's rights under the Due Process Clause.**

The Due Process Clause of the Fourteenth Amendment incorporates, with some qualifications, the first ten amendments to the Constitution and makes them applicable to the states. The clause also independently forbids the states to deprive persons of life, liberty or property without due process of law. Because we believe that the appellants' First Amendment argument is merely a restatement, with minor variations, of their property argument we do not discuss that argument separately in this brief. Here we examine only the contention that the decision below violates the right not to be deprived of property without due process of law.

In interpreting the meaning of "due process," considerably wider deference is accorded governmental action as against a claim of deprivation of property without due process of law than as against claims of deprivation of life or liberty. Such broad leeway is necessary so that government is able to cope with the problems, and meet the needs, of a twentieth century industrial and commercial society.

Whether any federal constitutional right to due process is violated will in many instances depend on whether, under state law, the individual's claim rises to the level of a property interest. For example, whether a teacher who is not rehired has a federal constitutional right to procedural due process depends on whether state law creates a property right and not merely an amorphous expectation of continued employment. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972).

To be sure, this Court retains the power to review state court determinations of whether a property right exists. Likewise, there are certainly limits beyond which the states cannot go in failing to recognize interests as property. Nevertheless, substantial deference should be paid to the determinations of the state courts. As this Court observed in *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 42 (1944), a case involving a due process challenge to a state court decision allocating certain trust funds:

Decisions of this Court as to its province in such circumstances were summarized in *Broad River Power Co. v. South Carolina*, 281 U.S. 537, 540, 50 S. Ct. 401, 402, 74 L.Ed. 1023, as follows: "Whether the state court has denied to rights asserted under local law the protection which the Constitution guarantees is a ques-

tion upon which the petitioners are entitled to invoke the judgment of this Court. Even though the constitutional protection invoked be denied on nonfederal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus evaded. \* \* \* But, if there is no evasion of the constitutional issue, \* \* \* and the nonfederal ground of decision has fair support, \* \* \* this Court will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule for that of the state court."

What property rights inhere in ownership of a shopping center is primarily a question of state law. The Supreme Court of California has consistently held, with only one exception,\* that a shopping center owner has no right to exclude persons who seek to solicit, and that members of the public have a concomitant right, guaranteed by the California Constitution, to enter the premises of a shopping center for the purpose of soliciting the public. That determination can hardly be considered unreasonable; indeed, it was adopted for a time by this Court in *Logan Valley*.

To phrase the matter somewhat differently, the Supreme Court of California held that a shopping center is, as a matter of California law, a public forum. That decision, delimiting the appellants' property rights, and granting certain rights under state law to the appellees, was not unreasonable given the social circumstances that the court below found existed in California. It follows that appel-

\* The exception, of course, was *Diamond v. Bland*, 11 Cal. 3d 331, 113 Cal. Rptr. 468, 521 P.2d 460, cert. denied, 419 U.S. 885 (1974), in which the Supreme Court of California reached a different result under what it thought to be the compulsion of federal law.



lants' rights under the Fourteenth Amendment were not violated by the decision below.

Even if this Court should find that appellants retain a property right under state law sufficient to invoke the protection of the Fourteenth Amendment's Due Process Clause, it must balance that interest against the rights granted appellees by virtue of the state constitution.

This Court has not already struck that balance in *Lloyd Corp., Ltd. v. Tanner, supra*. The Court in *Lloyd* held only that no federal First Amendment right to handbill at a shopping center existed because the necessary element of state action giving rise to a First Amendment claim was absent (407 U.S. at 570):

We hold that there has been no dedication of Lloyd's privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights.

*Lloyd* did not recognize a constitutionally protected property right of shopping center owners to exclude persons such as appellees who are exercising a free speech right; it simply found no First Amendment right of would-be handbillers to distribute handbills at privately-owned shopping centers. As this Court's opinion in *Hudgens v. NLRB, supra*, makes clear, the *Lloyd* Court did not balance First Amendment free speech rights against private property rights and did not decide that the latter must prevail. Rather, because the refusal to allow handbilling in *Lloyd* was deemed a refusal by a mere private property owner, no First Amendment claim existed. The Court therefore had no occasion to strike a balance between free speech rights and private property rights.

Here, however, since the state court has determined that appellees have, as a matter of state law, a right to distribute literature in shopping centers, regardless of the existence *vel non* of traditional state action, it is incumbent on this Court to weigh that right against Pruneyard's asserted rights under the Fourteenth Amendment.

So much is the teaching of *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978). There, this Court held that an employer's rights to control his property must be balanced against his employees' rights, conferred by the National Labor Relations Act, although not by the First Amendment, to act collectively. And, as in that case, we submit that the balance must be struck in favor of appellees both because the rights they assert have a preferred place in the hierarchy of American values, *Marsh v. Alabama, supra*, and because, as in *Eastex*, there has been no significant interference with appellants' use of their property.

Here, the Supreme Court of California has determined that the state Constitution guarantees a right of free speech and a right to petition the government which includes the right to exercise those rights in privately-owned shopping centers. The Supreme Court of California determined that that right is necessary to the very operation of California's form of government.

That determination does not impose any financial burden on shopping center owners. The court below found that appellees' activities did not interfere with the operation of the shopping center. No shoppers were deterred from shopping at Pruneyard as a result of appellees' activities. No tenants complained. All that appellants have lost

is the power to act as feudal lords and to control what might be said on the property they had opened to the public—a power that the Supreme Court of California has reasonably held is not incidental to the ownership of a twentieth century shopping center.

Thus, even if this Court should find that appellants retain a property right under state law sufficient to invoke the protection of the Fourteenth Amendment's Due Process Clause, the court below struck the correct balance.\*

Appellants' entire argument that the decision below deprives them of their property rights is based on a fundamental misconception of the scope of constitutional protection for private property. Appellants' argument can survive only if *any* governmental curtailment of property rights is a violation of due process. But that is not the law, nor could it be in an increasingly complex society.

That the restriction on one aspect of property ownership imposed by the decision below—the power to exclude outsiders from petitioning for redress of grievances—does not constitute a deprivation of property without due process of law follows from a long line of decisions of this Court, including a case decided this Term, *Andrus v. Allard*, 48 U.S.L.W. 4013 (Nov. 27, 1979). There, the Eagle Protection Act's prohibition of commercial transactions in relics of birds legally killed before passage of the Act were upheld against a Fifth Amendment deprivation of property claim. While it was undeniable that the appellees, owners of such

\* It may well be argued that Pruneyard cannot assert any Fourteenth Amendment Due Process claim for it has been held by the sovereign which created its property rights in the first instance that these rights do not extend as far as appellants claim. Cf. *Martinez v. California*, 48 U.S.L.W. 4076, 4077 n. 5 (Jan. 15, 1980).

relics, would suffer an economic loss as a result of the Act, this Court rejected the claim that the deprivation rose to constitutional magnitude. Citing its decision in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), this Court stated (48 U.S.L.W. at 4017):

The Takings Clause, therefore, preserves governmental power to regulate, subject only to the dictates of "justice and fairness." " *Penn Central*, *supra*, at 124; see *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962). There is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate. Formulas and factors have been developed in a variety of settings. See *Penn Central*, *supra*, 123-128. Resolution of each case, however, ultimately calls as much for the exercise of judgment as for the application of logic.

The regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. Rather, a significant restriction has been imposed on one means of disposing of the artifacts. But the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety. Compare *Penn Central*, *supra*, at 130-131, and *United States v. Twin City Power Co.*, 350 U.S. 222 (1956) with *Pennsylvania Coal Co. v. Mahon*, *supra*, and *United States v. Virginia Electric & Power Co.*, 365 U.S. 624 (1961). See also Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1230-1233 (1967). In this case, it is crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds.

That holding is fully applicable here. At most, appellants have been deprived on one strand of their "bundle of property rights"—and, unlike the situation in *Andrus v. Allard*, not even the most profitable one.

Although the record indicates that appellants have suffered no hardship whatever as a result of the decision below, no different result would be required even were there some minimal economic loss. As this Court reiterated in *Andrus* (48 U.S.L.W. at 4017), some economic loss as a result of governmental regulation is a burden which must be borne to secure "the advantage of living and doing business in a civilized community [citation omitted]." That observation applies with particular force when the challenged "deprivation" is designed to insure free and effective discourse on matters of public concern—the right that, perhaps more than any other, makes our society civilized.

### Conclusion

**For the reasons stated, the judgment below should be affirmed.**

Respectfully submitted,

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January, 1980



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1979

No. 79-289

Supreme Court, U. S.

FILED

FEB 1 1980

MICHAEL E. BAKER, JR., CLERK

PRUNEYARD SHOPPING CENTER, et al.,

*Appellants,*

—v.—

MICHAEL ROBINS, et al.,

*Appellees.*

ON APPEAL FROM THE CALIFORNIA SUPREME COURT

**BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION  
OF NORTHERN CALIFORNIA, THE ACLU FOUNDATION  
OF SOUTHERN CALIFORNIA, AND THE AMERICAN CIVIL  
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In The  
SUPREME COURT OF THE UNITED STATES  
October Term, 1979

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No. 79-289

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PRUNEYARD SHOPPING CENTER, et al., Appellants,  
v.  
MICHAEL ROBINS, et al., Appellees.

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On Appeal From The California Supreme Court

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BRIEF OF  
THE AMERICAN CIVIL LIBERTIES UNION  
OF NORTHERN CALIFORNIA, THE ACLU FOUNDATION  
OF SOUTHERN CALIFORNIA, AND THE  
AMERICAN CIVIL LIBERTIES UNION, AMICI CURIAE

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Interest of Amici

The American Civil Liberties Union of  
Northern California and the ACLU Foundation  
of Southern California are the California re-  
gional affiliates of the American Civil  
Liberties Union, a nationwide, nonprofit, non-  
partisan membership organization dedicated to  
the defense and preservation of the individual  
rights guaranteed by the state and federal  
constitutions. Since its inception, this  
organization has been especially concerned

with the constitutional right of expression, and committed to preserving the greatest opportunity for wide dissemination of constitutionally-protected ideas. In pursuit of this goal, the ACLU has participated in numerous cases, including the present case, involving the right to circulate petitions where people live, work, and shop.

The present case involves California's right to safeguard constitutional rights of freedom of expression and petition under its own constitution, and to define state property rights so as to preserve a greater scope for public expression than the federal Constitution requires. The ACLU and its California affiliates therefore submit this brief in the hope that it will substantially assist the Court in resolving the constitutional questions raised by petitioners, questions we view as frankly unsubstantial.

Counsel for Appellants and Appellees have consented to the filing of this brief. The letters of consent have been filed with the Clerk of this Court.

Statement Of The Case

The decision by the California Supreme Court below held that it is a fundamental right of individuals in California, guaranteed by their own state constitution, to communicate freely on matters of public concern in the open areas of a suburban shopping center. Appellants' effort to reverse that decision jeopardizes the most basic of a State's rights: to define through state property laws and constitutional provisions the proper accommodation between civil rights of individuals and owners of commercial property.

Plaintiff-Appellees were Santa Clara County high school students and their religious school teacher who, concerned by a United Nations resolution against Zionism, attempted one weekend afternoon to obtain signatures on a petition opposing the resolution in the mall area of the Pruneyard Shopping Center, located in suburban Santa Clara County. Although these children confined their efforts to a cardtable in the corner of the mall, were orderly and peaceful, and did not interfere with shopping



center activities, they were directed to leave by the Pruneyard's security officers. Their efforts to obtain injunctive relief, denied in the lower courts, were ultimately upheld by the California Supreme Court.

Recognizing this Court's holding in Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), that similar (i.e., leafletting) activity in a Portland, Oregon shopping center was not protected by the First Amendment, Appellees and this Amicus argued, and the California Supreme Court held, that under California property laws and the more expansive language of the California free speech guarantee, Appellees could lawfully engage in their activity on the Pruneyard property. Robins v. Pruneyard Shopping Center, 23 Cal.3d 899, 153 Cal.Rptr. 854, 592 P.2d 341 (1979).

#### Introduction and Summary of Argument

Critical to an understanding of the jurisdictional and substantive issues raised by this appeal is what this case involves and what it does not involve, distinctions which Appellants blur or fail to

acknowledge. The case does not involve private residential property, nor any other property held for the private use of its owners, nor property held for the private use of fee-paying members. Rather, the case involves a 21-acre suburban center of 65 shops, 10 restaurants, walkways, plazas, and a cinema, all held open to the public at large.

The case does not involve any interference with the primary uses intended for that property. Appellees sought merely to communicate with other visitors to the mall in the open, congregating area of the mall. Moreover, the decision below does not involve an interpretation of First Amendment protection for Appellees' activity. Rather, the case involves an interpretation by the highest court of California of state property law, as well as state constitutional provisions protecting freedom of speech and petitioning for governmental redress of grievances. Points IA and IB.

It does not involve a "taking" within the meaning of the Taking Clause of the Fifth Amendment as applied through the Fourteenth Amendment. Appellants apparently

concede this fact (Appellants' Br. at 11 n.4), as they must, because case law is soundly to the contrary, and because there was neither an affirmative defense nor a record nor a finding below that Appellees' peaceable use of a cardtable to solicit signatures on a petition to the Government constituted a taking, with or without the state action required by the Fifth and Fourteenth Amendments. Point IC. Additionally, although Appellants claim that the decision below violates their substantive due process rights protected by the Fourteenth Amendment, they fail to clarify that this claim involves due process in the context of economic regulation for the public good. Point ID.

ARGUMENT

I. NO SUBSTANTIAL FEDERAL QUESTION UNDER THE FIFTH AMENDMENT IS RAISED BY THE DECISION BELOW.

A. The California Supreme Court's Decision Consists Of An Interpretation Of State Property Interests And State Constitutional Rights Of Free Speech.

The decision below was two-pronged, interpreting both California free speech rights and California property rights. The California Supreme Court expressed its free speech holding as follows:

In this appeal from a judgment denying an injunction we hold that the soliciting at a shopping center of signatures for a petition to the government is an activity protected by the California Constitution.

23 Cal.3d at 902.

With respect to the property interests at issue, the Court further held that under California law, "[m]embers of the public

are rightfully on Pruneyard premises because the premises are open to the public during shopping hours." Id. at 905.

1. The California Constitutional Free Speech Guarantee Protects Appellees' Activity

The Court below determined that California's free speech guarantee, Article 1 Section 2, is broader than the First Amendment, and that it protects the free speech efforts of Appellants at the Pruneyard. The power to fashion safeguards for the civil rights of a State's own citizens that are more protective than the minimum standards of the federal Constitution has long been recognized by this Court. See, e.g., Cooper v. California, 386 U.S. 58, 62 (1967). See generally Brennan, "State Constitutions and the Protection of Individual Rights", 90 Harv. L.Rev. 489 (1977).

Unsatisfied with only the terse, negative mandate of the First Amendment, California adopted more expansive language, assuring Californians the additional

affirmative right that:

Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right . . . .

California Constitution,  
Article 1, §2.

Beginning as early as 1896, the California Supreme Court has consistently interpreted this provision as guaranteeing broader protection than the First Amendment, ruling that the California right to free speech is virtually "unlimited,"<sup>1/</sup> "uninhibited,"<sup>2/</sup> "viewed with great solicitude,"<sup>3/</sup> "among the most precious of our citizenry,"<sup>4/</sup>. Significantly, the Court has held that Article 1 Section 2 not only guarantees individuals the "right to air their beliefs, [but also] society [the] right to hear them."<sup>5/</sup>

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1/ Dailey v. Superior Court, 112 Cal. 94, 96-98 (1896).

2/ Wilson v. Superior Court, 13 Cal.3d 652, 658 (1975).

3/ Wilson v. Superior Court, *supra*.

4/ Jacoby v. State Bar, 19 Cal.3d 359, 380 (1977).

5/ Id. at 368.



Owners of California property held open to the public at large have long known that California policy requires that their property accommodate the expression of beliefs on public issues, subject to reasonable restrictions prohibiting interference with the property's primary use. E.g., Diamond v. Bland, 3 Cal.3d 653 (1970); In Re Lane, 71 Cal.2d 872 (1969); In Re Hoffman, 67 Cal.2d 845 (1967); Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union, 61 Cal.2d 766 (1964); see In Re Cox, 3 Cal.3d 205 (1970).

In Diamond, a case involving a shopping center, the Court concluded on the basis of its own precedent:

"It is immaterial that another forum, equally effective, may have been available to petitioners . . . . Absent the presence of some conflicting interest that could be protected in no other way, petitioners have the right to choose their own forum."

3 Cal.3d at 664, quoting In Re Hoffman, supra, 67 Cal.2d at 852 n.7 (the holding in Diamond, on First Amendment grounds, was subsequently reversed under the authority of Lloyd Corp. v. Tanner, supra.) .

Although certain of these decisions were based on the First Amendment, they nevertheless express California's clear policy that freedom of speech encompasses the right to communicate ideas in suburban communities by seeking out citizens in the mall areas of shopping centers.

Following this established and consistent trend, the California Supreme Court in Pruneyard merely held, on the facts of this case, that the state constitution guarantees the right in California peaceably to petition for signatures, under reasonable restrictions, on the grounds of a suburban shopping center mall held open to the public, a question that had earlier been reserved. Diamond v. Bland II, 11 Cal.3d 331 (1974).

2. California Property Law  
Does Not Give Appellants  
The Right To Exclude  
Appellees.

Of course, in reaching this interpretation of the state constitutional guarantee, the court had to consider the Pruneyard's property interests. Again,

however, this was a question of state, not federal, law. In a series of cases this Court has ruled that "[p]roperty interests . . . are not created by the Constitution." Board of Regents v. Roth, 408 U.S. 564, 577 (1972) (emphasis in original). Accord, Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 160 n.10 (1978); Bishop v. Wood, 426 U.S. 341, 344 (1976); United States v. Willow River Power, 324 U.S. 499 (1944). Rather, this Court has insisted that states possess the fundamental power to define what constitutes that "bundle of rights" that is property.

In the decision below, California has merely defined the incidents of ownership of certain real property to permit the conduct of expressive activity which does not interfere with the real property's principal economic use. Such a definition of the substantive scope of the incidents of ownership of California realty lies comfortably within Bishop v. Wood's recognition of state power. Accordingly, unless appellants can point to a source of Federal law vesting them with a property

right more extensive than the rights recognized by the California Supreme Court, no Federal question exists in this case.<sup>6/</sup>

B. Lloyd v. Tanner Does Not Provide Appellants With A Federal Source of Law Creating The Property Right They Assert.

Appellants argue that in deciding Lloyd v. Tanner, this Court recognized the existence of a supervening federal property right which must override California's attempt to define its property interests less expansively. However, Appellants seriously misread Lloyd. As the Court noted in Lloyd, where state law recognizes certain incidents of ownership, the Fifth and Fourteenth Amendments act to prevent the erosion of such "property" rights.<sup>7/</sup>

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6/ This Court is, of course, bound by the California Supreme Court's definition of the meaning of California property law. Oregon v. Hass, 420 U.S. 714, 719 (1975).

7/ Lloyd is, thus, entirely consistent with the Board of Regents v. Roth, 407 U.S. 564 (1972) decided during the same term.

Lloyd does not, however, stand for the proposition that the federal constitution itself creates substantive property rights independently of state law.<sup>8/</sup>

In Lloyd, a group of protestors secured an injunction prohibiting a shopping center in Portland, Oregon from interfering with their distribution of handbills in the shopping center mall. Reversing the lower courts' conclusion that the center was "the functional equivalent of a business district" and that the protestors' activity was therefore protected by the First Amendment, the Supreme Court halted the increasing trend, reflected in Marsh v. Alabama, 326 U.S. 501 (1946) and Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968) to find private property to be sufficiently "public" in character - the "public function" analysis - to satisfy the state action

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8/ Any attempt to read Lloyd as recognizing the Fifth and Fourteenth Amendments as independent sources of substantive property rights runs headlong into Board of Regents v. Roth, Bishop v. Wood, and Flagg Bros., Inc. v. Brooks, supra.

requirement of the First Amendment.<sup>9/</sup> Distinguishing Marsh on the ground that its holding was applicable only to cases in which "private interests were substituting for and performing the customary functions of government" 407 U.S. at 562, the Court rejected the respondents' contention that the First Amendment required treating the shopping center as a public forum:

Respondents contend . . . that the property of a large shopping center is "open to the public," serves the same purposes as a business district" of a municipality, and therefore has been dedicated to certain types of public use . . . . It is then

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9/ Marsh v. Alabama, which the Lloyd Court distinguished, was a state action case originating the "public function" theory of state action. See generally Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 157, 158 (1978); Evans v. Newton, 382 U.S. 296, 299, 302 (1966) ("Conduct that is formally "private" may become . . . so impregnated with a governmental character as to become subject to the constitutional limitations on state action . . . . Like the streets of the company town in Marsh, . . . this park . . . should be treated as a public institution . . . regardless of who now has title under state law.").



asserted that all members of the public, whether invited as customers or not, have the same right of free speech as they would have on the similar public facilities in the streets of a city or town.

The argument reaches too far. The Constitution by no means requires such an attenuated doctrine of dedication of private property to public use.... Marsh v. Alabama, supra, involved the assumption by a private enterprise of all of the attributes of a state-created municipality and the exercise by that enterprise of semi-official municipal functions as a delegate of the State. In effect, the owner . . . stood in the shoes of the State.

Id. at 568-69 (footnote omitted, emphasis supplied).

The Lloyd Court did not hold that the shopping center owner's rights would be violated - that is, that there would be a deprivation of property without due process or a "taking" without compensation - if the free speech activity were allowed.

Although the Court commented on the "relevance of" the Due Process Clause, it did so solely to emphasize the general importance of private property in the context of state action. Id. at 567. Indeed, the actual holding in Lloyd does not mention the purported constitutional rights of the owner, focusing instead on the absence of state action:

We hold that there has been no such dedication of Lloyd's privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights.

Id. at 570.

C. The Decision Below Results In No Violation Of Any Federally-Protected Property Rights.

Apart from their misplaced reliance on Lloyd, Appellants argue generally that the decision below violates rights "rooted in" the Fifth and Fourteenth Amendments (Appellants' Br. at 10), and that these rights grant the shopping center owner the absolute power to exclude anyone who does not meet the "owner's desires." (Appellants' Br. at 11.) But, as set forth above, the

Fifth and Fourteenth Amendments do not create or define property rights.

To invoke the protection of the Fifth and Fourteenth Amendments - and this Court's jurisdiction - the decision below upholding Appellees' right to use a cardtable to seek signatures for a petition must have constituted either an uncompensated "taking" of the Pruneyard's property by the government or a denial by the government of due process as that concept has been defined in the context of economic regulation.<sup>10/</sup> Appellants and Amici in their support conspicuously avoid any analysis of their claim, as well as any discussion of this Court's opinions defining these asserted rights.

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<sup>10/</sup> The Court can reject Appellants' Fifth and Fourteenth Amendment claims at the outset if it holds, as in Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 155-157, 164-166 (1978), that Appellees' alleged invasion of Appellants' rights is not governmental action. Here, as in Flagg Brothers, no Constitutional rights have been violated since only private parties, not state actors, have engaged in allegedly offensive conduct. Id. at 156-157. Here, as in Flagg Brothers, Appellees should look to state law, not Constitutional law, for relief from private activity, if any.

Because a violation of either the taking or substantive due process clauses would be the only basis for reversal of the decision below, and because a holding that such a violation occurred here could jeopardize enforcement of federal and state civil rights and public accommodations laws as discussed below, the alleged violation of these two rights must be carefully analyzed. As revealed by that analysis below, Appellants' argument fails.

1. Appellees' Use of a Cardtable in a Corner of the Pruneyard Mall to Obtain Signatures on a Petition Does Not Constitute a "Taking" by the State Without Just Compensation.

Given Appellants' concession that this is not a condemnation case (Appellants' Br. at 11 n.4), no discussion of the taking clause would seem necessary. However, Appellants nonetheless argue that the decision below violates property rights "rooted" in that clause.

Penn Central Transport Co. v. New York, 438 U.S. 104 (1978), pointedly missing from all of the briefs in support of Appellants,

is the Court's most recent, comprehensive interpretation of the Taking Clause. As carefully explained in that case, whether a particular regulation constitutes either a permissible, noncompensable exercise of police power or a taking requiring compensation "depends largely 'upon the particular circumstances [of each] case,'" requiring a determination of the public purpose served by the restriction and "factual inquiries" into the "economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment backed expectations." Id. at 124, 126-27 (citations omitted). The necessity of this inquiry was recently reaffirmed in Kaiser Aetna v. United States, U.S. 48 U.S.L.W. 4045, 4048 (1979) (discussed below).

Appellants failed to develop the requisite record below; they failed even to raise an affirmative defense to the complaint on the grounds of a taking or a denial of due process, or any other ground. (See Answer to Complaint, Appellants' Appendix at 10-11). This lack of record

necessary for a taking violation claim requires dismissal of the argument that they have been deprived of "property." See Goldblatt v. Hempstead, 369 U.S. 590 (1962), cited with approval in Penn Central, supra, 438 U.S. at 126-27 (assumption that ordinance "did not prevent reasonable use of property since the owner made no showing of an adverse effect on the value of the land.").

It is apparent why such a record was not attempted. Even if Appellants had tried to show that Appellees' activity somehow diminished the economic value of the Pruneyard, the Supreme Court held in the Penn Central case that a deprivation of an owner's most profitable use of property or a mere diminution in property values - in that case, several million dollars a year - does not constitute a taking. At issue in the Penn Central case was a New York law enacted to preserve historic landmarks which impeded the owner of New York's Grand Central Terminal from constructing an addition to the terminal. The Court upheld the law as a valid exercise of



police power for public aesthetic goals and, therefore, not a taking of property rights requiring compensation. The Court observed:

[T]he submission that appellants may establish a taking simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable.

Id. at 130.

The Court in Penn Central canvassed numerous other decisions which deemed "taking" challenges without merit where governmental action, for example (1) prohibited a beneficial use to which property had previously been devoted causing substantial harm (see cases cited Id. at 126-27); or (2) significantly diminished property values (e.g., Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) [75% diminution], Hadacheck v. Sebastian, 239 U.S. 394 (1915) [87 1/2% diminution]). The "taking" challenge in Penn Central was rejected even though, as noted in the dissent, the state law not only prohibited a beneficial use, but imposed an affirmative duty to maintain

the property in a certain way. 438 U.S. at 145-47 (Rehnquist, J., dissenting).

United States v. Causby, 328 U.S. 256 (1946), which Appellants off-handedly cite to support their claim of a compensable "right to exclude" (Appellants' Br. at 11 n.4), was soundly distinguished in Penn Central. In Causby, the owner's air rights were being physically invaded by repeated flights of government airplanes. The Court in Penn Central observed:

A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, see, e.g., United States v. Causby, 328 U.S. 256 (1946), than when interference arises from some public program adjusting the benefit and burdens of economic life to promote the common good.

438 U.S. at 124.

It is just such an adjustment for the common good that the decision below effectuated. Appellants' property is hardly "invaded" when it is already open to the public at large.

This "adjustment for the public good" concept was even more recently reaffirmed in Andrus v. Allard, U.S. 48 U.S.L.W. 4013, 4017 (1979), which is also surprisingly missing from all of the briefs in support of Appellants. The Court in Andrus rejected the argument that the retroactive application of the federal Eagle Protection Act (prohibiting commercial transactions in eagle feathers) to pre-existing artifacts utilizing such feathers constituted a "taking." Id. at 4017. The Court explained:

To require compensation in all such circumstances [where "adjustment for the public good" curtails the use or economic exploitation of property] would effectively compel the government to regulate by purchase. Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law . . . .

. . . .

It is true that appellees must bear the cost of these regulations. But, within limits, that is a burden borne to secure "the advantage of living and doing

business in a civilized community."

Id. at 4017, quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413, 422 (1922).

In any event, whatever interference might otherwise be caused Appellants by allowing free speech activity on the Pruneyard can unquestionably be contained under California law by the imposition of reasonable time, place and manner restrictions limiting such interference. In Re Hoffman, supra, 67 Cal.2d at 850. As in Penn Central, these restrictions, such as confining the activity to a designated spot, would allow Appellants:

to use the remainder of the parcel in a more gainful fashion. This is no more an appropriation of property by government for its own uses than is a zoning law prohibiting [certain uses] . . . .

438 U.S. at 135.

The foregoing analysis of this Court's "taking" cases demonstrates that, as Appellants seem to concede, there has not been a "taking" (or, in Appellants' words,

a "condemnation", Appellants' Br. at 11, n.4) and consequently that the right guaranteed by the Taking Clause has not been violated. If there has not been a "taking" of property, Appellants have no Constitutional claim for deprivation of their property. Appellants nonetheless seem to argue that the owner of a publicly open shopping center has a "right to exclude" persons not meeting the "owners' desires" which the government may not diminish without compensation, although again Appellants do not claim a right to compensation. (Appellants' Br. at 11-12). Appellants rely exclusively on Kaiser Aetna v. United States, <sup>11/</sup>supra, while evidently avoiding any claim that Kaiser Aetna controls the outcome of this case or that compensation is required. Appellants also ignore, for obvious reasons, the language in Kaiser Aetna that the "taking question" requires "factual inquiries . . . [of] the economic impact of the regulation [and] its interference with reasonable investment backed expectations . . . ." 48 U.S.L.W. at 4048.

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<sup>11/</sup> Appellants additionally cite other cases at page 11 of their brief, all of which involved the right of homeowners, not owners of public accommodations, to preserve the privacy of their homes from commercial peddlers.

It is quickly apparent from a reading of Kaiser Aetna why Appellants shy away from a claim that the decision is controlling. Kaiser Aetna involved the conversion of a privately-owned and used pond and channel into a privately owned and privately-used marina, open only to fee-paying members of the marina. The fees were paid in part "to maintain the privacy and security of the pond." Id. at 4046. The action arose because the federal government sought to compel free public use of this privately-owned and used marina for recreational and commercial purposes on the ground that the widening of the channel had rendered the channel navigable waters under the government's jurisdiction. The Court upheld Kaiser Aetna, finding that an "expectancy" in continued private use of the channel and marina had been created by the express, unconditioned consent given by the federal government to dredge the channel. Id. at 4049. Unlike the present case, then, Kaiser Aetna involved neither property held open to the public nor a regulation leaving the economic purpose of the property substantially intact. Rather it involved a government



deprivation of the very essence of the property owner's interest.

The Pruneyard also relies on a 50-year-old case, Delaware, Lackawanna & Western R.R. Co. v. Town of Morristown, 276 U.S. 182 (1928), which invalidated under the taking clause an ordinance which established taxicab stands on the premises of a privately-owned railroad station. It is questionable whether this somewhat dated case would be resolved the same way today in view of recent cases such as Penn Central. In any event, however, the case involved an interference with a core use of the property for another party's commercial exploitation. Appellants have not even attempted to argue that the peaceable use of a cardtable for political petitions substantially interferes with the commercial use of the Pruneyard. Rather, Appellants apparently argue an absolute right to exclude which cannot be restricted in any degree without constituting an unconstitutional taking.

This asserted "right to exclude" has never been recognized in the context of public accommodations, or compensation would have been required for deprivation of a "property" right

to exclude Blacks. If it had, a substantial body of federal and state civil rights legislation would fall. In an article addressing the mid-60's efforts of property owners lobbying against civil rights legislation on the basis of a property right to exclude, Professor Richard Powell observed:

If one looks far enough backward it could fairly be said that the "he who owns, may do as he pleases with what he owns."

Powell, "The Relationship Between Property Rights and Civil Rights," 15 Hast. L.J. 135, 139 (1963).

But, he explained, society advances; the concept of property "is not absolute, but is a system of rights and duties that are determined by society." Id. (citation omitted). Reviewing in detail the growing restrictions on the use of property permissible under the police power, Professor Powell summarized:

All of these qualifications upon the completeness of property rights have come into our law because of an increased recognition of society's stake in the law of property.

. . . The otherwise existent power to make uses of land . . . has been kept within limits because of the requirements of social welfare.

. . . . .

[C]ourts have repeatedly assert[ed] that "property rights" are, and always have been, held subject to the "police power"; that is, the power of the government to do that for which it exists, namely, to impose restrictions (without compensation to the owner) upon property owners, whenever such restrictions serve the . . . general welfare of the governed group.

. . . . .

[T]he governmental police power requires that the liberty of a landowner be curtailed so as to assure the longer liberties of other human beings.

. . . . .

Property rights have been redefined in response to a swelling demand that Ownership be responsible and responsive to the needs of

the social whole. Property rights cannot be used as a shibboleth to cloak conduct which adversely affects the . . . welfare of others.

Id. at 142, 143, 144, 149-50.

In summary, the Fifth Amendment Taking Clause does not create or define property rights. The "property right" guaranteed by the Taking Clause is solely the right to be paid compensation when the state-defined property right is "taken" by the government within the meaning of that clause.

Under California property law, as discussed in Point I above, Appellant's property rights do not include the right to exclude peaceful, expressive petitioning activity during business hours, but only to **regulate** it. Under this Court's decisions interpreting the Taking Clause, therefore, which Appellants and their supporting Amici fail to address, there has been no "taking."

2. Protection of Appellees' Free Speech Rights, Subject to Reasonable Restrictions, Does Not Deprive Appellants of Property Without Substantive Due Process.

In apparent recognition that Lloyd

is not controlling and that there has not been a "taking" of Pruneyard's property by the state without just compensation, Appellants contend that the decision below nevertheless violates Appellants' rights to substantive due process under the Fifth and Fourteenth Amendments. Analysis of this claim must take into account, as Appellants do not, that economic regulation is at issue, and that this Court has not invalidated any state regulation of economic policy for violation of substantive due process since Thompson v. Consolidated Gas Co., 300 U.S. 55 (1937), decided 42 years ago.

The trend away from invalidating laws as violative of economic due process, followed as recently as 1978 in Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (statute upheld prohibiting petroleum refiners from operating retail service stations in state), began with Nebbia v. New York, 291 U.S. 502 (1934) (conviction of selling milk below state-fixed price upheld), in which this Court announced:

[Neither] property rights nor contract rights are absolute; . . . . Equally fundamental with the private right is that of the

public to regulate it in the common interest . . . .

[T]he guarantee of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the objective sought to be attained.

Id. at 523, 525.

In Railway Express Agency v. New York, 336 U.S. 106 (1949), involving a city ordinance prohibiting advertising on vehicles, this Court rejected a carrier's substantive due process claim, similar to the Pruneyard's, that it had a right to use its property as it wished.

The power of the state to regulate economic activity specifically for the protection of civil rights, as in the decision below, was upheld against a substantive due process claim in Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952). In refusing to invalidate a law requiring employers to allow employees



time off with pay so that they could vote, the Court concluded:

[T]he police power is not confined to a narrow category; it extends . . . to all the great public needs. The protection of the right of suffrage under our scheme of things is basic and fundamental . . . . [M]any forms of regulation reduce the net return of the enterprise; yet that gives rise to no constitutional infirmity. Most regulations of business necessarily impose financial burdens on the enterprise for which no compensation is paid. Those are part of the costs of our civilization . . . .

Id. at 424.

Day Brite, involving the right to vote, surely controls here where the fundamental right of free speech is at stake.

Finally, Appellants' specific claim of a "right to exclude" protected by the Due Process Clause, for which Appellants have not cited any applicable authority, <sup>12/</sup>

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<sup>12/</sup>While it is not clear whether Appellants rely on the Kaiser Aetna case to support a violation of the Taking Clause or a violation of economic substantive due process, the decision was based solely on the Taking (footnote cont'd next page)

was specifically rejected by this Court over a decade ago in Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964), when restaurant owners had claimed a constitutional right to exclude Blacks.

Moreover, if Appellants' contentions are correct, then this Court's decision in Eastex, Inc. v. NLRB, 437 U.S. 556 (1978), would have required compensation for the property right invaded by the leafletters

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(footnote cont'd from previous page)

Clause. Moore v. City of East Cleveland, 431 U.S. 494 (1977), on which Appellants also rely, is not an economic substantive due process case. It involved residential housing and a homeowner's conviction under an ordinance limiting occupancy to members of one's immediate family. As the Court carefully noted, the ordinance intruded on the constitutionally-protected "'private realm of family life'." 431 U.S. at 499, quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1955).

in that case. In Eastex the Court was faced with the right of workers under the National Labor Relations Act to distribute union newsletters during nonworking hours in nonworking areas of the employer's property, where the newsletter did not seek action by the employer and involved matters over which the employer had no control. Id. at 572. Otherwise stated, at issue was the permissibility of a physical entrance onto privately-owned property, as in this case, by private individuals authorized by the government, as in this case, for purposes other than that intended by the owner, as in this case. Significantly, the property invaded in that case was not open to the public, as in this case, but rather was a corridor in a manufacturing plant leading to the employer's time clocks. In upholding the right of the workers to engage in that leafletting, the Court rejected the employer's contention that where there was no showing that alternative means of communication were unavailable, the activity violated the owner's property rights. Id.

The Court has frequently emphasized that

"[t]he burden should rest heavily upon one who would persuade [this Court] to use the due process clause to strike down a substantive law or ordinance." Railway Express Agency v. New York, supra, 336 U.S. at 112 (Jackson, J., concurring). Appellants, who never raised economic due process as an affirmative defense in the trial court below and have failed to cite any pertinent economic substantive due process decisions, have failed to meet that burden.

II. APPELLEES' EXERCISE OF THEIR  
FREE SPEECH RIGHTS DOES NOT  
VIOLATE APPELLANTS' ASSERTED  
FIRST AMENDMENT RIGHT TO RE-  
MAIN SILENT.

Appellants assert for the first time in this appeal that to safeguard Appellees' free speech rights violates their asserted First Amendment "right to remain silent." (Appellant's Br. at 13.) In support of this rather startling contention, Appellants cite this Court's decisions in West Virginia State Bd. of Education v. Barnette, 319 U.S. 624 (1943), Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) and Wooley v.

Maynard, 430 U.S. 705 (1977). Appellants' reliance on these cases, however, is misplaced; not only is each of them factually distinguishable, the express language of each case compels the conclusion that, whatever protection the First Amendment may afford to refrain from speaking in some instances, such protection does not apply here.

In Barnette, this Court held that public school students could not be compelled to participate in the pledge of allegiance to the United States flag, since to do so would constitute a "compulsion of students to declare a belief." 319 U.S. at 631. As the opinion makes clear, the constitutional infirmity of such a requirement is that it "requires the individual to communicate by word and sign his acceptance" of a government-dictated set of political ideas (Id. at 633), whether or not he subscribes to such views. Such compulsion cannot be tolerated, since no individual can, consistent with the United States Constitution, be forced to "confess by word or act" his

belief in any state-prescribed idea. Id. at 642.

Similarly, in Wooley, a state statute requiring owners of noncommercial vehicles to display license plates bearing the state motto "Live Free or Die" was held to be violative of the First Amendment, since the effect of the statute was to compel the individual to disseminate a state-imposed ideological message. 430 U.S. at 173. As in Barnette, the Court held that the state's interest in espousing a particular ideology must be subordinated to the First Amendment rights of those who choose not to be "the courier for such message." Id. at 717.

As these two decisions demonstrate, an attempt by the state to require its citizens to communicate a state-sponsored message cannot be sustained, for "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein." Barnette, supra, 319 U.S. at 642.

In Tornillo, the Court struck down a



Florida statute requiring a newspaper to publish a political candidate's reply to criticism previously published in that newspaper. The Court held that the state cannot mandate what a newspaper must print: "The Florida statute exacts a penalty on the basis of the content of a newspaper." 418 U.S. at 256 (emphasis added). The Court expressed its concern that a right-of-access statute such as the one in question would eventually lead newspaper editors to avoid its application by refraining from publishing controversial political statements, thereby "dampen[ing] the vigor and limit[ing] the variety of public debate." Id. at 257, quoting New York Times Co. v. Sullivan, 376 U.S. 245, 279 (1964). But even assuming that the free press considerations expressed in Tornillo are applicable to the free speech question here, the Court's concern in Tornillo in ensuring that "the free discussion of governmental affairs" not be stifled (Id.) shows that Tornillo undermines Appellants' position here.

That the present case does not fall within the Barnette-Tornillo-Wooley rubric

is clear. The state is not mandating the content of any speech. No state sponsored message is at issue, nor is Appellants' asserted right to remain "ideologically neutral" jeopardized. Moreover, Appellants themselves are not being forced to espouse any view at all. Since persons may presumably even now shop at Pruneyard wearing political buttons or slogans on their clothes, appellants' argument proves far too much. All that is required by the California Constitution is that Appellants allow others to express themselves, subject to such reasonable regulations as Appellants may wish to promulgate.<sup>13/</sup> Since it was precisely these factors which led this

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<sup>13/</sup> The reasonable person would not attribute to the owner of a shopping center the views espoused by persons allowed to engage in expressive activity thereon, particularly since it can be assumed that such activity would encompass a wide variety of divergent views. The Court has never intimated that in public forum cases, municipalities have thereby become the "speaker" of the message expressed. See e.g., Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546 (1975).

Court in Barnette, Tornillo and Wooley to invalidate the challenged state statutes on First Amendment grounds, Appellees submit that their absence in this case mandates the opposite result.

#### CONCLUSION

This Court has never suggested that a state's property laws which permit free speech activity on shopping center grounds could constitute a "taking" without just compensation or a denial of economic substantive due process. Lloyd held only that because of the lack of state action, the First Amendment could not be used as a sword to compel a shopping center to permit expressive activity otherwise forbidden by state law.

The California Supreme Court's decision in this case consists of nothing more than an interpretation of a state constitutional guarantee of free speech and a determination that state property law requires that such rights be accommodated by the owners of shopping centers which have been opened to the public at large.

Under this Court's decisions, this accommodation for the public good raises no substantial federal question. It is not a "taking" within the meaning of the Fifth Amendment, and cannot be invalidated for violation of either economic substantive due process or Appellants' speciously-asserted First Amendment rights.

Accordingly, this Court should dismiss this appeal for lack of jurisdiction or, in the alternative, affirm the decision below.

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IN THE  
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October Term, 1979

No. 79-289

PRUNEYARD SHOPPING CENTER and  
FRED SAHADI,

Appellants,

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ON APPEAL FROM  
THE SUPREME COURT OF CALIFORNIA

---

BRIEF OF PEOPLE'S LOBBY, INC.,  
AS AMICUS CURIAE,  
IN SUPPORT OF APPELLEES

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BRIEF OF PEOPLE'S LOBBY, INC.,  
AS AMICUS CURIAE,  
IN SUPPORT OF APPELLEES

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IN THE  
SUPREME COURT  
OF THE UNITED STATES  
October Term, 1979  
No. 79-289

PRUNEYARD SHOPPING CENTER and  
FRED SAHADI,

Appellants,

vs.

MICHAEL ROBINS, et al.,

Appellees.

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BRIEF OF PEOPLE'S LOBBY, INC.,  
AS AMICUS CURIAE,  
IN SUPPORT OF APPELLEES

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INTEREST OF THE AMICUS  
CURIAE<sup>1/</sup>

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People's Lobby is a non-profit California corporation consisting of volunteer citizens who

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<sup>1/</sup> This brief is being filed with the written consent of all parties. Pursuant to Supreme Court Rule 42(1), these consents are being filed simultaneously with the Clerk of the Court.

1.

utilize California's initiative process for the purpose of direct legislation. The right of the initiative is guaranteed by Article IV, Section 1 of the California Constitution, which provides as follows,

"The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum."

To secure the requisite number of signatures on initiative petitions to qualify measures for the ballot, volunteers frequently find it necessary to enter shopping centers, where persons may sign the petitions. Indeed, People's Lobby utilized shopping centers to qualify the Political Reform Act of 1974 for the ballot, which was subsequently approved by California voters. See Fair Political Practices Com. v. Superior Court, 25 Cal.3d 33 (1979), cert. den. \_\_\_ U.S. \_\_\_ (1980); Diamond, California's Political Reform Act: Greater Access to the Initiative Process, 7 Southwestern L. Rev. 454 (1975).

People's Lobby is concerned that a decision adverse to appellees herein will destroy the right of the initiative guaranteed by California's Constitution. People's Lobby also filed an amicus curiae brief in Lloyd v. Tanner, 407 U.S. 551 (1972) and in the instant case before the California Supreme Court. In addition, People's Lobby was a party in Diamond v. Bland, 3 Cal.3d 653 (1970), cert. den. 402 U.S. 988 (1971) and Diamond v. Bland, 11 Cal.3d 331,

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cert. den. 419 U.S. 1097 (1974), two prior shopping center access cases. Thus, People's Lobby is extremely interested in the decision in the instant case.

### ARGUMENT

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#### THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS DO NOT PRECLUDE CALIFORNIA FROM RECOGNIZING A RIGHT OF ACCESS TO SECURE SIGNATURES ON INITIATIVE PETITIONS CIRCULATED PURSUANT TO THE CALIFORNIA CONSTITUTION

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The instant case does not involve the circulation of initiative petitions pursuant to the California Constitution. The California initiative process is special and must not be lumped together with the distribution of handbills, Lloyd v. Tanner, 407 U.S. 551 (1972) or the solicitation of unofficial petitions. While amicus curiae believes appellees' position is correct, amicus curiae nevertheless wants to make sure that no matter how this Court eventually rules, it will not result in the restriction of the initiative process in California.

California voters, like the voters in twenty other states, enjoy the precious right of the initiative-direct democracy. Access to shopping centers in California is especially important because of the prominent role the modern shopping

center plays in California life. Most residents have abandoned the downtown areas in major California cities in favor of suburban shopping centers. If registered voters cannot be contacted at shopping centers, they cannot be contacted at all. Most apartment buildings prohibit door to door solicitation, and door to door canvassing of private homes, which would not encompass a cross-section of the community, is much too slow.

Justice Mosk, dissenting in Diamond v. Bland, 11 Cal.3d 331 at 343, recognized the peculiar problems facing initiative petitioners:

"There is in the instant case an element, not present in any of the authorities cited above, which provides additional support for vindication of plaintiff's rights. Plaintiff sought to collect signatures on an initiative petition and to distribute literature relating to the initiative. Under our Constitution, the power of initiative is reserved to the people (art. IV, §1), and courts are zealous to preserve its unfettered exercise 'to the fullest tenable measure of spirit as well as letter.' (McFadden v. Jordan (1948) 32 Cal.2d 330, 332 [196 P.2d 787].) In order to implement this vital policy, we have recognized that it is desirable for initiative measures to reach the ballot without delay or excessive expenditures of time, money and effort. (Gage v. Jordan (1944) 23 Cal.2d 794, 799 [147 P.2d 387].)

"Article IV, section 22, of the California Constitution specifies that an initiative petition must be signed by electors equal in number to 5 percent (for a statute) and 8 percent (for a constitutional amendment) of the votes cast for all candidates for Governor at the last election. At the time plaintiff sought to qualify the anti-pollution initiative, more than 500,000 signatures were required; normal attrition dictates that a considerable number in excess of that figure be obtained to assure that the petitions contain 500,000 valid signatures. The Legislature has specified in the Elections Code that proponents of an initiative measure must obtain the requisite number of signatures within a maximum of 150 days from the date the Attorney General delivers the summary of the chief purpose of the measure. (Elec. Code, §§3507, 3520.)

"It seems evident that in order to secure such a large number of signatures in 150 days -- nearly 3,500 every day -- the proponents of a measure must have access to places at which a substantial number of persons congregate on a regular basis. This is particularly true in the case of poorly financed measures

which must rely upon volunteers rather than upon an army of paid professional canvassers, door-to-door solicitors, and advertising through the media as a means of informing the public of the proponent's views prior to actual solicitation. In order to avoid the possibility that the initiative process will become the captive of well-financed special interest groups, and in view of the long-standing and emphatic expressions of state policy in favor of the full and free exercise of the right of initiative, plaintiff should be accorded the right to solicit signatures on initiative petitions and distribute literature with regard to such measures at the Inland Center."

The time factor is not present when an unofficial petition is being circulated. With an initiative petition the entire campaign fails if the required number of signatures is not obtained in the allotted time. An unofficial petition can be useful even if the number of signatures is less than that originally sought by the sponsors.

Persons circulating initiative petitions are similar in status to deputy voter registrars. The process of gathering signatures on initiative petitions, unlike unofficial petitions, is highly regulated. See California Elections Code §§29710 to 29791. Thus, there is little likelihood that the circulation of initiative petitions would lead to any disruption of the shopping center. If initiative petitions may not be circulated at shopping centers, where they have been for years in California, then



presumably voter registrars could not register voters at shopping centers.

The difference between the circulation of initiative petitions and the distribution of handbills is even greater than the difference between the circulation of initiative petitions and unofficial petitions. This greater difference is significant in view of this Court's decision in Lloyd v. Tanner, supra, which involved the distribution of handbills at a shopping center in Portland, Oregon. There, this Court's five justice majority was concerned about the litter allegedly caused by handbill distribution. Also, this Court's majority noted that the handbillers could distribute handbills to motorists entering the parking lot from a location just off the shopping center premises. Id. at 567. Obviously, one cannot obtain a signature on a petition from a motorist entering a shopping center parking lot.

Factually, therefore, the handbilling in Lloyd is significantly different than circulating initiative petitions.

Constitutionally, the alleged right to handbill at a shopping center is significantly different than the state's right asserted herein, the right to circulate initiative petitions pursuant to the state's constitution. This Court has not rejected the legitimate interests of the states in our federal system. In Board of Regents v. Roth, 408 U.S. 564 (1972) and Perry v. Sindermann, 408 U.S. 593 (1972), this Court held that it is up to the states to define property rights. In view of this, why cannot a state, acting either through its legislative or judicial

branches, declare a right of access for initiative circulation purposes?

This Court has not totally foreclosed access to private property. In Hudgens v. NLRB, 424 U.S. 507 (1976), this Court held that while labor union picketers did not have a first amendment right of access, they could have a right of access under the National Labor Relations Act, a decision hardly consistent with the shopping center's view that property rights under the Fifth and Fourteenth Amendments permit the owner to prohibit absolutely certain activities on its property. See also ALRB v. Superior Court, 16 Cal.3d 392, cert. den. 429 U.S. 802 (1976).

#### CONCLUSION

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For the foregoing reasons, the Court is requested to affirm the decision of the California Supreme Court or, at a minimum, recognize California's right to establish access to shopping centers for initiative petitioning.

Respectfully submitted,

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Attorney for  
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